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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Department of Transportation Form MCS-90, a federally mandated endorsement to a motor carrier's insurance policy, requires the insurance company to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." The issue presented is whether the MCS-90 Endorsement requires the insurance company to pay a judgment against a defendant that is not an insured under its policy.

LIST OF PARTIES

In addition to the parties listed in the caption, Lawrence P. Yob, Bath Transport, Inc., and Express Companies of Americas, Inc., defendants in the trial court, were parties in the Ohio Supreme Court.

CORPORATE DISCLOSURE STATEMENT

National Union Fire Insurance Company of Pittsburgh, Pa. is a wholly owned subsidiary of American International Group, Inc. ("AIG"), a publicly held corporation. No parent or publicly held company owns more than 10% of the shares of AIG. Petitioner Centra, Inc. ("Centra") is a privately held company. Petitioners Central Transport, Inc. and GLS Leasco of Michigan, Inc. are wholly owned subsidiaries of Centra.

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U.S. Dep't of Transportation, Federal Motor Carrier Safety Administration, Fact Sheet, Safety Fitness (as of Oct. 1, 1999), *available at* http://www.fmcsa.dot.gov/factsfigs/factsheet.htm.....9

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PETITION FOR A WRIT OF CERTIORARI

National Union Fire Insurance Company of Pittsburgh, Pa.; American International Group, Inc.; Centra, Inc.; Central Transport, Inc.; and GLS Leasco of Michigan, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App. 1a) is reported at 95 Ohio St. 3d 441 and 768 N.E.2d 1158. The opinion of the Court of Appeals of Ohio (App. 18a), is reported unofficially at 2000 Ohio App. LEXIS 5771 and 2000 WL 1804347. The judgment entry of the Ohio Court of Common Pleas (App. 26a) is not reported.

JURISDICTION

The opinion of the Supreme Court of Ohio was issued on June 12, 2002. That opinion reinstated the trial court's declaratory judgment that there was insurance coverage under the policy at issue here. That declaratory judgment had been certified by the trial court as a final judgment under Ohio R. Civ. P. 54(B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions from 49 U.S.C. §§ 13901, 13902, 13906, and 31139 (1994 & Supp. V 1999) are reproduced at App. 30a. The regulations promulgated under those statutory provisions are published at 49 C.F.R. §§ 387.1 to 387.419. Pertinent provisions are excerpted at App. 34a. The MCS-90 Endorsement, as set forth at 49 C.F.R. § 387.15, appears at App. 35a.

STATEMENT OF THE CASE

Federal law requires motor carriers to register with the Department of Transportation, 49 U.S.C. § 13901, and, as a

condition of registering, to satisfy "minimum financial responsibility" requirements prescribed by the Secretary of Transportation. *Id.* § 13902(a)(1)(C). Pursuant to this authority, the Secretary requires that insurance policies issued to motor carriers contain an endorsement, known as a "Form MCS-90 Endorsement." Under this endorsement, the motor carrier's insurer agrees to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." App. 38a.

In this case, the negligence of the operator of a tractor-trailer combination, each part separately owned and separately insured, was the cause of an accident resulting in the deaths of two persons. Respondents, the decedents' representatives, obtained declaratory judgments from the Ohio courts that there was insurance coverage for their wrongful death claims under two policies: (1) the policy issued to the owner of the tractor, which was also the employer of the driver and (2) the policy issued to the owner of the trailer. Coverage under the policy on the trailer is the subject of the instant petition. There was no claim below that the owner of the trailer was liable either directly or vicariously for the accident, and neither the tractor owner nor its driver was a covered insured under the trailer policy. The Ohio Supreme Court nonetheless ruled that the trailer's insurer was required by the MCS-90 Endorsement to provide coverage.

Certiorari should be granted to review this ruling because it contravenes the plain language of the MCS-90 Endorsement and the accompanying Department of Transportation ("DOT") regulations; is contrary to DOT's construction of its regulations, as recently briefed to this Court;[1] and stands in conflict with the decisions of at least

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[1] Brief for the United States as Amicus Curiae in *John Deere Insurance. Co.* v. *Nueva*, *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-

four circuits and of other state courts. The issue is a recurring one that will almost certainly be raised with increasing frequency in the future. For all of these reasons, the issue raised by this case warrants plenary review by the Court.

A. Regulatory Background

As noted above, 49 U.S.C. § 13901 requires that motor carriers be registered with the Department of Transportation. A prerequisite for such registration is compliance with minimum financial responsibility requirements. *Id.* § 13902(a)(1)(C). DOT may register a motor carrier only if it files "a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by [49 U.S.C. § 31139]." 49 U.S.C. § 13906(a)(1). The required security "must be sufficient to pay," up to the policy limit, "each final judgment against the registrant for bodily injury to, or death of, an individual resulting from negligent operation, maintenance, or use of motor vehicles . . . ." *Id.* The Secretary of Transportation must, in addition, "prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required . . . ." *Id.* § 13906(f).

Pursuant to these requirements, the Secretary of Transportation has promulgated regulations that, as relevant here, require motor carriers to carry at least $750,000 in insurance coverage. 49 C.F.R. § 387.9. Both the Secretary's own regulations and carry-over regulations initially promulgated by the Interstate Commerce Commission[2]

1491) (filed Jan. 3, 2002). Excerpts from this brief are reproduced below at App. 45a.

[2] The ICC was abolished by the ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803), and its functions were transferred to the Department of Transportation.

mandate that the required insurance policies contain Form MCS-90 as an endorsement. 49 C.F.R. §§ 387.15, 387.313(a)(4).[3]

The MCS-90 Endorsement is significant because liability insurance policies purchased by motor carriers typically contain terms that limit coverage to certain parties or property (*e.g.*, coverage may be excluded as to persons or vehicles not listed on the policy), condition coverage on the satisfaction of certain conditions (*e.g.*, that the insured give timely notice of an accident), or otherwise exclude certain types of claims. As a result, some judgments secured by an injured party against insured motor carriers might not be covered by standard insurance policies. By its terms, the MCS-90 Endorsement renders inoperative any limitations or exclusions in the base insurance policy on claims by the injured public against the named insured. It requires the insurer of a motor carrier to pay, within the limits of coverage, "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of [regulated] motor vehicles . . . [notwithstanding any] condition, provision, stipulation, or limitation contained within the policy . . . ." App. 38a.

The MCS-90 Endorsement does not, however, change the terms of the contractual relationship between the insurer and the insured motor carrier. It provides that "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the [insurance] company." App. 39a. To that end, the MCS-90

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[3] The version of the MCS-90 Endorsement in the policy at issue here continued to refer to the "ICC" even though (as noted in the preceding footnote) that agency had been abolished in 1995. App. 35a. It was only in October 2001 that DOT adopted technical amendments to Form MCS-90 eliminating the references to the Interstate Commerce Commission. 66 Fed Reg. 49867, 49872-73 (Oct. 1, 2001).

Endorsement provides that the motor carrier "agrees to reimburse the [insurance] company for any payment . . . that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." *Id.*

B. Factual Background

On October 11, 1996, a tractor-trailer operated by Lawrence P. Yob crossed the median of the Ohio Turnpike and struck an automobile, killing both occupants. Yob was employed by the owner of the tractor, Bath Transport, Inc. ("Bath"). Through an insurance policy issued by National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), Bath maintained $1 million in coverage on the tractor (the "Tractor Policy"), with an MCS-90 endorsement of $1 million in potential coverage.[4]

The trailer was separately owned and separately insured. There was some dispute in the trial court as to exactly what entity owned the trailer at the time of the accident, *i.e.*, Centra, Inc., or one of its subsidiaries, Central Transport, Inc., or GLS Leasco of Michigan, Inc. (the "Centra defendants). It was agreed, however, that resolution of this issue was not necessary to disposition of the case. See App. 26a. All of those entities were covered by a separate insurance policy issued by National Union (the "Trailer Policy") that provided $2.5 million in coverage under its base policy and under the MCS-90 Endorsement.

It is undisputed that the Trailer Policy's definition of "insured" excluded coverage for both Yob and Bath.[5] The

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[4] Form MCS-90 in the Bath policy appeared to show $2 million in coverage, but the trial court reformed the policy on the ground that reference to $2 million, rather than $1 million, was the result of a mutual mistake. App. 27a.

[5] The Trailer Policy stated that "insured" did not include "[a]ny 'trucker' or his or her agents or employees, other than you and your employees: [¶] (1) if the 'trucker' is subject to motor carrier insurance

dispute litigated below and the issue raised by this petition is whether the MCS-90 Endorsement overrode the definition of "insured" in the Trailer Policy so as to require National Union to pay judgments against Yob and Bath under it.

C. Proceedings in the Court of Common Pleas

On January 24, 1997, Marie V. Lynch and Susan Reese, administratrices of the decedents' estates, filed a complaint for wrongful death in the Ohio Court of Common Pleas for Trumbull County against Yob; Bath; Bath's corporate parent, Express Companies of America, Ltd.; the Centra defendants, and the Ohio Turnpike Commission.[6] Thereafter, they filed an amended complaint in which they added National Union and its parent American International Group, Inc.,[7] as defendants. In this amended complaint, plaintiffs, in addition to pursuing their wrongful death claims for damages, sought a declaratory judgment that coverage was available to pay those claims under both the Tractor and Trailer Policies. Significantly, the amended complaint contained no allegation that negligence on the part of the trailer's owner was a cause of the accident. Nor was there any allegation that the trailer's owner was vicariously liable for someone else's negligence.

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requirements and meets them by a means other than 'auto' liability insurance." App. 42a. Under the policy's definition of "trucker" ("any person or organization engaged in the business of transporting property by 'auto' for hire" (App. 43a)), Bath was plainly a "trucker." Because Bath was subject to "motor carrier insurance requirements" and met them by a means "other than an 'auto liability insurance," namely through the MCS-90 Endorsement, it did not qualify as an insured under the Trailer Policy.

[6] The Turnpike Commission was not named as a defendant in the amended complaint.

[7] American International Group, Inc. ("AIG") is a holding company that does not itself issue any insurance policies. Rather, policies are issued through AIG's member companies such, as in this case, National Union. See, *e.g.*, App. 43a. The joinder of AIG in this matter was accordingly erroneous.

Yob's negligence in causing the accident was not contested, leaving the only issues to be determined the amount of plaintiffs' damages and the existence of insurance coverage to pay those damages. With respect to the latter issue, the trial court granted summary judgment to plaintiffs, holding (1) that the $1 million coverage on the Tractor Policy was available to the estates;[8] and (2) that, even though Bath and Yob were *not* insureds under terms of the Trailer Policy (App. 28a), coverage was nonetheless available under the MCS-90 endorsement to the Trailer Policy up to the $2.5 million limit. The court reasoned that "[s]ince the MCS-90 endorsement allows coverage, the underlying language of the policy cannot be used to negate that coverage . . . ."[9] App. 29a.

The trial court ordered the case to proceed to trial on the issue of damages, but certified the declaratory judgments on coverage as final under Ohio R. Civ. P. 54(B). See App. 29a.

D. Proceedings in the Court of Appeals of Ohio

The Court of Appeals of Ohio reversed the declaratory judgment finding coverage under the Trailer Policy. App. 18a. The court noted that the trial court's determination that Yob and Bath were not insureds under the terms of the Trailer Policy was supported by the policy's language and, moreover, had not been appealed by plaintiffs. App. 21-22a. The court then held that the trial court erred in finding coverage under the MCS-90 Endorsement, reasoning that "there must be a final judgment against an 'insured' to trigger its provisions." App. 22a. Because neither Yob nor Bath

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[8] The court did grant defendants' motion to reform Form MCS-90 so that it provided $1 million, rather than $2 million, in coverage. See note 4 *supra*.

[9] The court also denied the motion of the trailer owners to be dismissed. That determination was later reversed by the Court of Appeals, App. 25a.

were "insureds" under the Trailer Policy, "the MCS-90 endorsement could not magically transform them into 'insureds' under the endorsement." App. 24a.

E. Proceedings in the Supreme Court of Ohio

By a four-to-three vote, the Supreme Court of Ohio reinstated the trial court's declaratory judgment that, by virtue of the MCS-90 Endorsement, coverage was available under the Trailer Policy "even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent." App. 2a. The court relied principally on the decisions in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-1491), and *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996). In those cases, the Ninth and Tenth Circuits, under somewhat different circumstances, ruled that the MCS-90 Endorsement provided coverage on claims against persons who were not insureds on the underlying insurance policy.[10] The Ohio court concluded, accordingly, that National Union's argument — that "the MCS-90 endorsement, the regulations giving rise to it, and the federal statutes authorizing the regulations all mandate by their explicit terms that there is no duty to indemnify a permissive user not covered by the underlying policy" — had been "specifically rejected by the holdings of" *Nueva* and *Adams*. App. 10a.

The Ohio court then considered other decisions pressed by National Union, where courts had ruled that the MCS-90 Endorsement did not supersede the definition of "insured" in

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[10] In *Nueva* and *Adams*, the policies defined "insureds" as including permissive users of the named insured's vehicle, but only if the vehicle was identified in the policy as a covered auto, which the accident vehicles in those cases were not. *Nueva*, 229 F.3d at 855; *Adams*, 99 F.3d at 966 & n.1. Here, as noted above, Bath and Yob were not insureds under the Trailer Policy by virtue of Bath being a "trucker." See note 5 *supra*.

the underlying policy, but for various reasons declined to follow them. App. 10-13a. See pp. 14-16 *infra*.

Likewise, the court rejected National Union's argument that the MCS-90's requirement that an insured reimburse its insurer for payments the insurer "would not have been obligated to make" but for the MCS-90 endorsement is inconsistent with the trial court's holding. National Union had asserted that, because an insurer has no contractual relationship with a permissive user, the insurer could never collect from such a user, but rather must seek reimbursement from its innocent insured. The court wrote off that concern as "peripheral" to its inquiry on the theory that it did not implicate the "key purpose" of the MCS-90 Endorsement — "to protect members of the public." App. 12a.

REASONS FOR GRANTING THE WRIT

This case raises a recurring issue of importance to the Nation's motor carriers and their insurers, as well as to the victims of accidents involving motor carriers: Who are the insureds covered by the MCS-90 Endorsement? The numbers of potentially affected persons is substantial. There are more than 500,000 registered motor carriers operating millions of trucks.[11] In 2000, 457,000 large trucks were involved in traffic accidents, of which 4,930 involved fatal crashes. One in eight fatal traffic accidents involved a large truck.[12] Certiorari should be granted so that carriers and their

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[11] U.S. Dep't of Transportation, Federal Motor Carrier Safety Administration, Fact Sheet, Safety Fitness (as of Oct. 1, 1999), *available at* http://www.fmcsa.dot.gov/factsfigs/factsheet.htm. The fact sheet shows that there were 505,900 active interstate motor carriers and 1.8 million combination trucks, 5.4 million tractors, and 19.7 million trailers or semitrailers.

[12] U.S. Dep't of Transportation, National Highway Traffic Safety Administration, Traffic Safety Facts 2000: Large Trucks, at 1 (DOT HS 809 325), *available at* http://www-fars.nhtsa.dot.gov/pubs/4.pdf.

insurers, as well as the lawyers representing accident victims, will know exactly who is covered by the MCS-90 Endorsement. Review in this case is especially warranted because the construction of the MCS-90 Endorsement adopted by Supreme Court of Ohio conflicts (1) with the plain meaning of the language of the Endorsement and the related DOT regulations, (2) with the interpretation of those provisions urged by the United States as amicus curiae in *John Deere Insurance Co.* v. *Nueva*, No. 00-1491, and (3) with the decisions of several U.S. Courts of Appeals and state courts.

The Court, of course, recently denied certiorari (122 S. Ct. 1063) in *Nueva*, apparently because the Solicitor General—though certain that the Ninth Circuit's decision was "incorrect"—said "the importance of the error [was] unclear." App. 54a. But the issue *is* an important one that will frequently recur, as this and other cases being litigated in the lower courts show. See p. 16 & note 18 *infra*. Now that the Department of Transportation has stated its position on the question, counsel representing carriers and their insurers will surely rely on that position in cases where plaintiffs seek coverage under the MCS-90 Endorsement for persons other than the named insured. Conversely, counsel for accident victims seeking to expand coverage under the Endorsement will base their arguments on the decision of the Ohio court in this case and the decisions of the Ninth and Tenth Circuits on which it relied. However the lower courts in those future cases decide the matter, the conflict in the interpretation of the MCS-90 Endorsement will only be exacerbated.

Rather than allow the present uncertainty to linger on until the conflict becomes intolerable, which would only drive up litigation and insurance costs, petitioners respectfully urge the Court to grant plenary review to resolve the issue now. Alternatively, they ask the Court to vacate the judgment below and remand the matter to Ohio Supreme Court so that the court can reconsider its decision in light of the position

adopted by the Department of Transportation, of which it was apparently unaware.[13]

I. The Amicus Brief for the United States in *Nueva* Demonstrates That the Ohio Court's Interpretation of the MCS-90 Endorsement Is Erroneous.

The Supreme Court of Ohio based its decision that the MCS-90 Endorsement alters the definition of "insured" in a motor carrier's insurance policy on the decision in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 (2002). But, as the Solicitor General stated in his amicus brief in *Nueva*, the decision of the Ninth Circuit in *Nueva* "is incorrect," for "existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself." App. 45a. That position, which reflects the "fair and considered judgment" of the Department of Transportation on the correct application of its regulations, is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins,* 519 U.S. 452, 461, 462 (1997) (citations and internal quotes omitted); accord, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). This is true even when that "fair and considered judgment" is rendered in an amicus brief. *Auer*, 519 U.S. at 462. Far from being either plainly erroneous or inconsistent with the regulations, the Department of Transportation's position is plainly correct.

First, 49 U.S.C. § 13906(a)(1) requires a registered motor carrier to file a security "sufficient to pay . . . for each final

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[13] The brief of the Solicitor General in *Nueva* was filed only a few days before argument before the Ohio Supreme Court in January 2002, and as a result the parties did not bring it to the attention of the Ohio court.

judgment *against the registrant*."[14] (Emphasis added.) Likewise, the regulations implementing the Act prohibit motor carriers from operating without proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier*." 49 C.F.R. § 387.301(a)(1) (emphasis added). In short, covered motor carriers must maintain sufficient security or insurance to pay judgments entered *against themselves* — not to pay judgments entered against someone else.

The statute further specifies that the Secretary "may determine the type and amount of security" to be required, and shall "prescribe the appropriate form of endorsement" to fulfill the statutory requirements. 49 U.S.C. § 13906(d) & (f). Pursuant to that authority, the Secretary's regulations prescribe Form MCS-90 as the appropriate form of endorsement. 49 C.F.R. §§ 387.7(b)(3) and (d), 387.15 (Illus. I), 387.313(a)(4). That endorsement requires an insurer to pay "any final judgment recovered *against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." App. 38a (emphasis added).

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[14] These regulatory provisions discussed in the text are the latest in a long line of statutes requiring motor carriers to obtain insurance or post other security. The Motor Carrier Act, 1935, required certificated or permitted motor carriers to post proof of insurance or other security "conditioned to pay . . . any final judgment *recovered against such motor carrier* for bodily injuries or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit . . . ." Interstate Commerce Act, § 215, as added, ch. 498, 49 Stat. 543, 557 (emphasis added). As codified and amended, the statute continued to require a motor carrier to file a security "sufficient to pay . . . for each final judgment *against the carrier* for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. § 10927(a)(1) (1994) (emphasis added). The ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803), which amended the relevant statutory provisions, simply carried forth the same approach, as shown in the text.

As the Transportation Department stated in the amicus brief in *Nueva*, the reference to "insured" in the MCS-90 Endorsement "can only sensibly be read to refer to the *named* insured to whom the underlying policies issued — that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements." App. 46a (emphasis in original).

That reading is confirmed by 49 C.F.R. § 387.5. It defines "insured" for purposes of Subpart A of Part 387 (the subpart containing Form MCS-90) as meaning "the *motor carrier named* in the policy of insurance, surety bond, [or] endorsement . . . ." 49 C.F.R. § 387.5 (definition of "Insured and principal") (emphasis added). As the Solicitor General told the Court in the *Nueva* amicus brief (App. 46-47a), this definition resolves any doubt about the meaning of "insured" in the MCS-90 Endorsement. Moreover, as was pointed out in that brief, there are ten other iterations of the term "insured" in the MCS-90 Endorsement which are "most naturally read to refer only to the named insured," of which "at least three cannot fairly bear any other construction." App. 47a.

In short, the Supreme Court of Ohio decision contravenes the plain language of the statute, regulations, and MCS-90 Endorsement, as all have been interpreted by the agency that promulgated the regulations.

II. The Ohio Supreme Court's Decision Exacerbates the Conflict in the Decisions of the Lower Courts.

The Ohio Supreme Court based its ruling primarily on the decisions of the Ninth and Tenth Circuits in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853, and *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964, respectively. Those decisions conflict with decisions from the District of Columbia, Eighth, Fifth, and Third Circuits holding that the federally required

insurance endorsements do not create coverage for any person other than the motor carrier named in the underlying policy,[15] and with comparable decisions from state courts.[16]

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[15] *National Mut. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 196 F.2d 597, 600 (D.C. Cir.) (The federal endorsement "does [not] make [the negligent driver] an 'insured' under the [motor carrier's] policy"—the definition of which "is still a matter governed by the express provisions of the body of the contract."), *cert. denied*, 344 U.S. 819 (1952); *Wellman* v. *Liberty Mut. Ins. Co.*, 496 F.2d 131, 139 (8th Cir. 1974) ("Since there was no judgment of liability against [the insured motor carrier], the regulations which . . . require insurance coverage for judgments against the carrier . . . may not be read into the insurance policy to impose liability upon the insurer of the motor carrier in contravention of the precise, express terms of the policy."); *White* v. *Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir.) ("[I]n order for [the insurer] to be liable under the policy filed by [the motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party."), *cert. denied*, 444 U.S. 965 (1979); *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128, 139 (3d Cir. 1979) ("[N]either the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duties to defend claims . . . or to pay judgments entered against others."). See also *Jackson* v. *O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996) ("Under the [MCS-90] Endorsement, [the insurer] undertook to pay any final judgment rendered against J & T Enterprises [the named insured motor carrier]."); *John Deere Ins. Co.* v. *Truckin' U.S.A.*, 122 F.3d 270, 275 (5th Cir. 1997) ("Because Copp Trucking is not an 'insured' under the Policy, the MCS-90 endorsement provides no basis for relief.").

[16] *Kesler* v. *Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) ("[T]he motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement."), *cert. denied*, 675 So. 2d 1085 (La. 1996); *Progressive County Mut. Ins. Co.* v. *Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997, review denied) (holding that the motor carrier, not his driver, is an "insured" under the MCS-90 Endorsement); *Transport Indem. Co.* v. *Teter*, 575 S.W.2d 780, 786 (Mo. Ct. App. 1978) ("[The] provisions of law directly only that a *motor carrier* answer to the public for negligent injury caused by a vehicle . . .; they express no public policy that a motor carrier provide against the liability of a driver of a nonowned vehicle . . . .") (emphasis in original).

The Ohio Supreme Court sought to downplay this conflict, but its rationales are wholly unconvincing. The court distinguished some cases on the ground that they involved "disputes between two insurance companies." App. 11a. But construction of the phrase "judgment against the insured" as used in the MCS-90 Endorsement cannot reasonably be understood as meaning one thing when the claimant is an accident victim and another when the claimant is an insurance company.

The Ohio court also claimed that decisions, such as the Eight Circuit's in *Wellman*, "predate the present MCS-90 endorsement and its accompanying regulations." App. 11a. But the court failed to identify any respect in which the prior regulations were materially different from the present ones. On the contrary, the Solicitor General in *Nueva* described the regulation at issue in *Wellman* as being "essentially the same . . . [as] Form MCS-90." App. 53a.

Next, the Ohio Supreme Court discounted contrary state court decisions on the ground that they "are not as authoritative as the two federal appellate court decisions . . . ." App. 11a. But it is the "right and duty" of state courts to interpret and apply questions of federal law when raised in cases before them. See, *e.g.*, *Idaho* v. *Coeur d'Alene Tribe,* 521 U.S. 261, 275-76 (1997) (plurality opinion); *Howlett* v. *Rose*, 496 U.S. 356 (1990). The question of which of two conflicting lower court decisions to follow should turn upon which decision is the more persuasive — not the identity of the court that made the decision. As demonstrated above, the decisions of the Ninth and Tenth Circuit ignore the plain meaning of the Endorsement and accompanying regulations and are, accordingly, erroneous.

At base, the court below justified its strained interpretation of the MCS-90 Endorsement on the ground that "the key purpose of the MCS-90 . . . is to protect members of the public." App. 12a. But, that purpose only

relates to ensuring that judgments against the registered carrier can be promptly paid without waiting for resolution of any insurance coverage disputes — not to ensuring that judgments against some third party will be paid.[17] As the amicus brief in *Nueva* states: "It is not . . . central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier." App. 48a.

III. The Court Should Grant Review To Resolve the Continuing Conflict on the Proper Interpretation of the MCS-90 Endorsement.

In his amicus brief in *Neuva*, the Solicitor General, after demonstrating that the decision of the Ninth Circuit was erroneous, stated that he was "not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court." App. 55a. In part, that doubt was based on the question of how often the issue of who is the "insured" under the MCS-90 Endorsement was likely to be litigated. App. 54a. In fact, the issue has been litigated frequently in the recent past.[18] As this case shows, the issue

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[17] The Transportation Department's regulations state: "The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1.

[18] See *Avalos* v. *Duron*, No. 00-2419, 2002 U.S. App. LEXIS 11426 (10th Cir. June 11, 2002) (unpublished decision applying *Adams*): *Miller* v. *Harco Nat'l Ins. Co.*, 241 F.3d 1331, 1333-34 (11th Cir. 2001) (certifying state law question to Georgia Supreme Court after district court dismissed claim against insurer because judgment had been entered against a related party rather than against the named insured carrier); *Nueva*, 229 F.3d at 858-59; *Adams*, 99 F.3d at 970; *Herkes* v. *Doe*, No. 01-0700 sec. M 2002 U.S. Dist. LEXIS 5747, at *5 (E.D. La. Mar. 25, 2002) (holding "where the policy provides no coverage for the vehicle,

is not going away. In fact, one case raising the issue is now pending in the New York Court of Appeals.[19] One can confidently predict that lawyers representing plaintiffs in accident cases involving trucks will pursue claims under the MCS-90 Endorsement against insurers of carriers that are not themselves liable on the basis of the decision in this case and the decisions in *Nueva* and *Adams*. This is particularly true in Ohio, where a series of controversial decisions under the state law of uninsured/underinsured motorist coverage[20] have triggered an explosion of lawsuits brought by a plaintiffs' bar that aggressively pursues claims for insurance coverage.[21]

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the MCS-90 Endorsement is triggered for the benefit of plaintiff"); *St. Paul Fire & Marine Ins. Co.* v. *Newman*, No. Civ. 99-0645-AH-C, 2000 WL 1367980, at *7 (S.D. Ala. Sept. 5, 2000); *Madere* v. *National Union Fire Ins. Co.*, No. Civ A. 98-3247, 2000 WL 1593441, at *8 (E.D. La. Oct. 24, 2000) (holding, in alternative, that MCS-90 obligation could be triggered by judgment against party other than named insured); *John Deere Ins. Co.* v. *Truckin' USA*, No. 3:95-CV-1556-D, 1996 WL 734952, at *4 (N.D. Tex. Dec. 10, 1996) (holding that the "'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy"), *aff'd*, 122 F.3d 270 (5th Cir. 1997); *Del Real* v. *United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd mem.*, 188 F.3d 512 (9th Cir. 1999); *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.); *Progressive County Mut. Ins. Co.* v. *Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997, review denied) (holding that the motor carrier, not his driver, is an "insured" under the MCS-90); *Kesler* v. *Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) (affirming dismissal of insurer because "the motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement."), *cert. denied*, 675 So. 2d 1085 (La. 1996).

[19] *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.).

[20] See, *e.g.*, *Scott-Pontzer* v. *Liberty Mut. Fire Ins. Co.*, 85 Ohio St. 3d 660, 710 N.E.2d 1116 (1999); *Ezawa* v. *Yasuda Fire & Marine Ins. Co.*, 86 Ohio St. 3d 557, 715 N.E.2d 1142 (1999).

[21] *Kormanik* v. *St. Paul Fire & Marine Ins. Co.*, 208 F. Supp. 2d 824, 826 (N.D. Ohio 2001) ("[T]he *Scott-Pontzer* line of cases has resulted in a burgeoning number of cases . . . .").

Courts in future cases will be put to the choice of either following the construction of the MCS-90 Endorsement expressed by the Transportation Department in the *Nueva* amicus brief or following the decisions of the Ohio court and the Ninth and Tenth Circuits. That conflict in the law will continue and can only intensify. Rather than allow the uncertainty to continue, the Court should grant review now to settle the matter.

The Solicitor General in *Nueva* also suggested that any error in the construction of the MCS-90 Endorsement could be rectified by interested parties petitioning DOT for a rule clarifying clarify DOT's regulations. App. 54-55a. But the regulations, properly interpreted by the DOT in a public brief, are clear now. There is no good reason to require a separate proceeding to make those rules more clear. Moreover, if the possibility of correction through rulemaking were an appropriate ground for denying certiorari, there would never be any reason for the Court to hear cases involving the interpretation of regulations. In any event, any future rulemaking proceeding could not correct the impact of the erroneous rulings of the Ohio Supreme Court and Ninth and Tenth Circuits in any cases where claims accrued prior to the adoption of any amended rule. Indeed, such a proceeding would likely create more uncertainty as to the effect of that new rule on pending cases. Finally, reliance on some future DOT rulemaking is unlikely to resolve the question expeditiously. After all, it took DOT six years to adopt technical amendments to its regulations to eliminate references to the abolished Interstate Commerce Commission. See note 3 *supra*.

In sum, the issue of the proper construction of the MCS-90 Endorsement is of continuing importance both to motor carriers, their insurers and the victims of accidents involving trucks. All desire (or, at least, should desire) to clarify the obligations of insurers in such cases. The Court should grant certiorari to provide the needed certainty

CONCLUSION

The Court should grant the petition and undertake plenary review. In the alternative, it should grant the petition, vacate the judgment of the Supreme Court of Ohio, and remand the case for consideration in light of the stated position of the Department of Transportation.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the Supreme Court of Ohio

SUPREME COURT OF OHIO

Nos. 2001-0210 and 2001-0121

MARIE V. LYNCH, ADMIN., et al.,
APPELLANTS

v.

LAWRENCE P. YOB, et al.,
APPELLEES

Submitted January 9, 2002—Decided June 12, 2002

Judges: ALICE ROBIE RESNICK, J. Douglas, F.E. Sweeney and Pfeifer, JJ., concur. THOMAS F. BRYANT, J. of the Third Appellate District, sitting for COOK, J. MOYER, C.J., T. BRYANT and LUNDBERG STRATTON, JJ., dissent

ALICE ROBIE RESNICK, J.:

{¶1} These appeals concern the scope of insurance coverage relating to a traffic accident, in which two automobile occupants died, that was caused by the admitted negligence of the operator of a tractor-trailer rig. At this point, questions pertaining to the coverage on the tractor involved in the accident have been resolved. At issue is

whether the policy of insurance covering the leased trailer involved in the accident is a potential source of recovery for the personal representatives of the accident victims and for their estates. The specific issue for consideration is whether coverage is available on the trailer under a federally mandated endorsement to the insurance policy, called an MCS-90 endorsement, even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent.

{¶2} To resolve this issue, we adopt the reasoning of recent decisions of two federal circuit courts of appeals and determine that coverage is available under the trailer policy's MCS-90 endorsement in this situation. We reverse the judgments of the court of appeals below and reinstate the judgment of the trial court.

I

Facts and Procedural History

{¶3} On October 11, 1996, an accident involving a tractor-trailer and an automobile occurred on the Ohio Turnpike. The driver of the automobile, Justin L. Reese, and his passenger, Stephen M. Wiley, were killed in the accident. The tractor-trailer was driven by defendant-appellee Lawrence P. Yob, an employee of the tractor's owner, defendant-appellee Bath Transport, Inc. ("Bath"), which is owned by defendant-appellee Express Companies of America, Ltd. Yob's negligence in causing the accident is not disputed. The tractor was insured by defendants-appellees American International Group, Inc. and National Union Fire Insurance Company of Pittsburgh (collectively "AIG"), with a policy limit of $1 million. It has now been established that this policy provides coverage for the accident and that the policy will indemnify Yob and Bath for any judgment against them up to the policy limit. It has further

been established that the tractor's policy had a federally mandated MCS-90 endorsement with a coverage limit of $1 million, which does not provide additional coverage beyond the $1 million provided by the tractor's liability policy.

{¶4} The parties agree that the trailer, owned by appellee GLS Leasco of Michigan, Inc., or by appellees Central Transport, Inc., and Central Cartage Company, was insured by AIG with a policy limit of $2.5 million.[1] The parties further agree that Bath and Yob are not included within the definition of "insureds" under this policy (because the policy specifically states that any "trucker" who is not an employee of the named insured is not an insured under its terms), so that coverage under the main policy is not available. Attached to this policy is an MCS-90 endorsement with a coverage limit of $2.5 million. The significance of the MCS-90 endorsement to the trailer policy is the subject of these appeals.

{¶5} On January 24, 1997, plaintiffs-appellants Marie V. Lynch, administrator of the estate of Stephen M. Wiley, and Susan Reese, administrator of the estate of Justin L. Reese, filed a wrongful-death action in the Trumbull County Court of Common Pleas against various defendants who allegedly were at fault in the accident. In an amended complaint, appellants revised the list of defendants, including the insurance companies as defendants, and added a claim for declaratory judgment, seeking to establish the extent and amount of coverage available under the tractor and trailer

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1. In an accident involving a tractor-trailer, the accident is considered to have arisen out of the use of each, and insurance coverage on both the tractor and the trailer is potentially implicated. See *Blue Bird Body Co., Inc. v. Ryder Truck Rental, Inc.* (C.A.5, 1978), 583 F.2d 717, 726-727.

policies. Although appellants in their initial complaint had included an allegation that negligent maintenance of the trailer contributed to the accident, appellants in their amended complaint dropped any allegation of wrongdoing by the trailer owner.

{¶6} All parties except Yob and Bath moved for summary judgment in the declaratory judgment portion of the action. Regarding the only issue pertinent to these appeals, appellants argued that coverage was available under the MCS-90 endorsement to the trailer policy. All appellees argued that coverage was unavailable. On that question, the trial court granted summary judgment to appellants, declaring that, although Bath and Yob were not insureds under the trailer policy, the MCS-90 endorsement to that policy applied and that coverage was available up to the $2.5 million policy limit. The trial court ordered the case to proceed to trial to determine appellants' damages and also determined under Civ.R. 54(B) that there was no just reason for delay in its judgment entry establishing the scope of insurance coverage.

{¶7} On appeal, the court of appeals reversed the judgment of the trial court pertaining to the trailer's MCS-90 endorsement, holding that there was no obligation for AIG to indemnify Bath and Yob under the trailer's MCS-90 endorsement for any damages appellants might recover against Bath and Yob. The court of appeals determined that "[b]y the plain language of the MCS-90 endorsement itself, there must be a final judgment against an 'insured' to trigger its provisions." The court of appeals went on to conclude that since neither Yob nor Bath, the only parties potentially liable for wrongful death, qualified as insureds in the underlying trailer policy, "the MCS-90 endorsement could not magically transform them into 'insureds' under the endorsement." The court of appeals found that appellees should have been granted summary judgment based on their argument that there was no coverage available to appellants

under the MCS-90 endorsement to the trailer policy. The cause is now before this court pursuant to the allowance of discretionary appeals.

II

The MCS-90 Endorsement

{¶8} Under the Motor Carrier Act of 1980, Sections 29 and 30, Public Law No. 96-296, 94 Stat. 793, July 1, 1980, certain commercial motor carriers engaged in interstate commerce must register with the United States Secretary of Transportation and must comply with minimum financial responsibility requirements established by the Secretary of Transportation. Sections 13902(a)(1) and 31139, Title 49, U.S.Code. To that end, Section 13906(a)(1), Title 49, U.S.Code provides:

{¶9} "The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes * * *. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property [being shipped] * * *), or both."

{¶10} See, also, Section 387.301, Title 49, C.F.R., a regulation related to the above authority, which provides that no motor carrier shall engage in interstate commerce unless certificates of insurance or other securities or agreements are filed with and accepted by the Federal Motor Carrier Safety Administration, "conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles."

{¶11} Regulations prescribed by the Secretary of Transportation pursuant to Section 31139(b), Title 49, U.S.Code require a base coverage amount of at least $750,000, with more in some situations, to fulfill the financial responsibility requirements. Sections 387.7(a) and 387.9, Title 49, C.F.R. The regulations require that a specific endorsement form must be included in any insurance policy to satisfy the registration and financial responsibility requirements. This form, the MCS-90 endorsement, is set out at Section 387.15, Title 49, C.F.R., at Illustration I, and is titled "Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980."[2]

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2. An MCS-90 endorsement is often referred to as an ICC endorsement because its form was initially prescribed under statutes delegating some of the enforcement of their provisions to the Interstate Commerce Commission. However, the ICC was abolished by the ICC Termination Act of 1995, and its responsibilities were transferred to the Surface Transportation Board of the Department of Transportation. Public Law No. 104-88, Section 201, 109 Stat. 803, 932-934, December 1995. At that time, the registration and financial responsibility statutes at issue in this case were revised and renumbered. (In particular, Section 13906, Title 49, U.S.Code is similar in many respects to former Section 10927, Title 49, U.S.Code.) However, Congress provided that regulations issued by the ICC would "continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law." Public Law No. 104-88, Section 204(a), 109 Stat. 941. (See note following Section 701, Title 49, U.S. Code.) In 1996, current Section 387.301, Title 49, C.F.R., was redesignated to its present location. See 61 F.R. 54,706, 54,709. For our purposes here, the pertinent regulations have remained the same in all material terms since first prescribed pursuant to the Motor Carrier Act of 1980. For a discussion of the effect of the ICC Termination Act of 1995 on the federal regulatory scheme covering interstate motor carriers, see *Empire Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.* 117 Md. App. 72, 91-95, 699 A.2d 482 (1997).

{¶12} The MCS-90 endorsement provides:

{¶13} "In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. * * * [N]o condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement."

III

Applicability of the MCS-90 Endorsement

{¶14} Courts that consider the applicability of an MCS-90 endorsement, a federally mandated endorsement to motor carrier insurance policies, construe its operation and effect as a matter of federal law. See *Canal Ins. Co. v. First Gen. Ins.*

Co. (C.A.5, 1989), 889 F.2d 604, 610, modified on other grounds (C.A.5, 1990), 901 F.2d 45; *Ford Motor Co. v. Transport Indemn. Co.* (C.A.6, 1986), 795 F.2d 538, 545.

{¶15} In a recent decision, the United States Court of Appeals for the Ninth Circuit considered the applicability of an MCS-90 endorsement in a situation that was similar factually to the situation before us. In *John Deere Ins. Co. v. Nueva* (C.A.9, 2000), 229 F.3d 853, certiorari denied (2002), ___ U.S. ___, 122 S.Ct. 1063, 151 L.Ed.2d 967, a tractor-trailer driver allegedly negligently caused an accident. The tractor driver and its owner were uninsured. The trailer involved in the accident was owned by an unrelated company, and was insured by John Deere Insurance Company. Id., 229 F.3d at 854. There was no allegation that the trailer owner was negligent.

{¶16} Pursuant to the terms of the main policy on the trailer at issue, coverage was not provided for the driver and owner of the tractor involved in the accident, but that policy included an MCS-90 endorsement. The insurer sought a declaratory judgment that it had no duty to indemnify its insured (the trailer owner) or the driver and owner of the tractor for any liability arising out of the accident. The district court granted the insurer's motion for summary judgment, finding that the MCS-90 endorsement did not create coverage for the driver and owner of the tractor. Id., 229 F.3d at 854-855.

{¶17} On appeal, the parties seeking recovery for injury and damages caused by the accident contended that the insurer could not rely on the limiting provisions of the underlying policy to avoid indemnifying permissive users of noncovered vehicles because the MCS-90 endorsement modified the definition of "insured" in the underlying policy. Id., 229 F.3d at 859. The Ninth Circuit reversed the judgment of the district court and found that the MCS-90

endorsement to the trailer's policy obligated the insurer to indemnify the driver and owner of the tractor. Id. at 860.

{¶18} The court stressed that "the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers." Id., 229 F.3d at 857. The court proceeded to follow the analysis of the Tenth Circuit Court of Appeals in *Adams v. Royal Indemn. Co.* (C.A.10, 1996), 99 F.3d 964, which it stated involved "nearly identical facts." Id. at 858. In *Adams*, the Tenth Circuit found that in this situation the MCS-90 endorsement indirectly modifies the insurer's policy definition of "insured" to expand coverage to include any permissive users of insured vehicles. See 99 F.3d at 970.

{¶19} The MCS-90 endorsement explicitly overrides any "condition, provision, stipulation, or limitation" in the policy that would relieve the insurer from its duty to pay, to the limits of the endorsement, a judgment against the insured for negligent operation. But appellees argue that this case does not involve any "condition, provision, stipulation, or limitation," and instead involves the more fundamental question of who is an insured under an insurance policy. Appellees contend that the MCS-90 endorsement operates to negate exclusions from coverage but cannot transform noninsured parties into insureds. In addition, appellees argue that there can be no recovery under the trailer owners' MCS-90 endorsement because there can never be a final judgment against the trailer owners, since appellants have dropped any allegations of the trailer owners' own negligence.

{¶20} Furthermore, appellees argue that *John Deere Ins. Co. v. Nueva* and *Adams* are distinguishable from this case because those cases involved underlying policies that limited coverage to specifically described vehicles, while this case involves a fundamentally different underlying policy limitation, that "truckers" other than employees of the named

insured are not covered while using the trailer. However, appellees' readings of *John Deere Ins. Co. v. Nueva* and *Adams* are much too restrictive. The end result of both those cases is that, on these facts, "an MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered" vehicle. *John Deere Ins. Co. v. Nueva*, 229 F.3d at 858; *Adams*, 99 F.3d at 971. The case sub judice involves a permissive user of a noncovered vehicle, the leased trailer at issue, and so the rule of *John Deere Ins. Co. v. Nueva* and *Adams* is fully applicable. That rule that emerges from those cases is that the MCS-90 endorsement should be read to eliminate *any* limiting clauses in the underlying policy restricting the scope of coverage. See *Adams*, 99 F.3d at 971; *John Deere Ins. Co. v. Nueva*, 229 F.3d at 859.

{¶21} We find that although there may be some factual differences between the case sub judice and the two federal appellate decisions (for example, that there is coverage available on the tractor in this case while there was not in *John Deere Ins. Co. v. Nueva* and *Adams*), the reasoning of those two cases fully applies to our determination. Furthermore, while appellees argue that the weight of authority favors a finding of no obligation to indemnify in this situation, for various reasons none of appellees' cases has the precedential value of those two decisions.

{¶22} First, appellees' basic argument is that the MCS-90 endorsement, the regulations giving rise to it, and the federal statutes authorizing the regulations all mandate by their explicit terms that there is no duty to indemnify a permissive user not covered by the underlying policy. However, this argument was specifically rejected by the holdings of *John Deere Ins. Co. v. Nueva* and *Adams*. Therefore, appellees' citation of cases such as *Del Real v. United States Fire Ins. Crum & Forster* (E.D.Cal.1998), 64 F.Supp.2d 958, affirmed without published opinion (C.A.9, 1999), 188 F.3d 512, 1999 WL 626619, are not as authoritative as the two federal

appellate court decisions we follow. Furthermore, the district court in *Del Real* held that the MCS-90 endorsement did not even apply because the trailer at issue in that case was not a motor vehicle licensed to carry property in interstate commerce. 64 F.Supp.2d at 964-965. Therefore, any consideration of the specifics of the MCS-90's provisions was surely dictum. See *Pierre v. Providence Washington Ins. Co.* (2001), 286 A.D.2d 139, 144, 730 N.Y.S.2d 550.

{¶23} Second, cases involving disputes between two insurance companies, unlike those involving an injured member of the public seeking recovery under a MCS-90 endorsement, do not implicate the key rationale behind the MCS-90 endorsement, which is the protection of the public. Therefore, any statements cited by appellees within decisions such as *Natl. Mut. Ins. Co. of the Dist. of Columbia v. Liberty Mut. Ins. Co.* (C.A.D.C. 1952), 196 F.2d 597, and *John Deere Ins. Co. v. Truckin' U.S.A.* (C.A.5, 1997), 122 F.3d 270 (both of which were principally disputes between insurance companies), for the point that only the named insured can be covered by an MCS-90 endorsement are of limited value to our consideration. For a compilation of cases concerning the allocation of losses when an MCS-90 endorsement is involved, see Annotation, Effect of Motor Carrier Act Provisions on Insurance and Indemnity Agreements (49 U.S.C.A. §§ 13906, 14102) in Allocating Losses Involving Interstate Motor Carriers (1999), 157 A.L.R.Fed. 549.

{¶24} Third, some of appellees' cited cases predate the present MCS-90 endorsement and its accompanying regulations and statutes. Although there are similarities between the current regulatory system and that in place prior to 1980, the Motor Carrier Act of 1980 also worked some significant changes to the regulatory scheme. Therefore, cases such as *Wellman v. Liberty Mut. Ins. Co.* (C.A.8, 1974),

496 F.2d 131, can be distinguished from the situation we consider.

{¶25} Fourth, state court decisions (particularly those of intermediate state appellate courts) interpreting the MCS-90 endorsement, which is mandated by federal law, do not have the persuasive value of decisions by federal circuit courts. Therefore, cases such as *Powers v. Meyers* (1995), 101 Ohio App.3d 504, 655 N.E.2d 1358, and *Progressive Cty. Mut. Ins. Co. v. Carway* (Tex.App.1997), 951 S.W.2d 108, cited by appellees, are not as authoritative as the two federal circuit court decisions we follow.

{¶26} Finally, appellees argue that the reimbursement provision of the MCS-90 endorsement, which requires the insured to reimburse the insurer "for any payment that the company would not have been obligated to make under the provisions of the policy except for" the MCS-90 endorsement, is at odds with a holding that an insurer must indemnify a permissive user of a noncovered vehicle. They argue that because the insurer has no contractual relationship with such a user, the insurer would be unable to obtain reimbursement from that user. Thus the insurer would have to forgo reimbursement or seek reimbursement from its innocent insured. However, just as in the situation involving a dispute between two insurance companies discussed above, questions involving disputes between the insurer and the insured do not implicate the key purpose of the MCS-90, which is to protect members of the public, and, therefore, such questions are peripheral to our inquiry. These arguments based on the reimbursement provision were implicitly rejected in the two federal circuit court decisions we follow, particularly in *Adams*, 99 F.3d at 972, where the court stated, "In situations where the policy absent the endorsement did not insure the vehicle which caused the injuries, the endorsement explicitly requires that the insured reimburse the insurer because the insurer's payment to the

injured motorist is a 'payment the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.' See 49 C.F.R. § 387.15. Thus, the public is protected by insurance and ultimate responsibility rests on the truckers, all as mandated by Congress * * *." For a case interpreting the reimbursement provisions of the MCS-90 in the context of an insurer seeking reimbursement from its insured, see *T.H.E. Ins. Co. v. Larsen Intermodal Serv., Inc.* (C.A.5, 2001), 242 F.3d 667.

{¶27} In conclusion, we agree with the court in *John Deere Ins. Co. v. Nueva*, 229 F.3d at 860, which stated that finding the driver and owner of the tractor in this type of situation to be insureds under the MCS-90 endorsement allows the MCS-90 endorsement to serve "the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public." As in that case, interpreting the endorsement in the way advocated by appellees "would frustrate this express Congressional goal." Id.

{¶28} Accordingly, the judgments of the court of appeals are reversed, and the trial court's declaratory judgment that coverage is available pursuant to the trailer's MCS-90 endorsement up to the endorsement's coverage limit of $2.5 million is reinstated.

Judgments reversed.

Douglas, F.E. Sweeney and Pfeifer, JJ., concur.

MOYER, C.J., T. BRYANT and LUNDBERG STRATTON, JJ., dissent.

THOMAS F. BRYANT, J., of the Third Appellate District, sitting for COOK, J.

LUNDBERG STRATTON, J., dissenting.

{¶29} I respectfully dissent from the majority's expansive interpretation of the MCS-90 endorsement. I believe that federal legislation, the language of the endorsement, and the intent of the parties support the opposite conclusion.

{¶30} The federal government's Motor Carrier Act of 1980 established minimum financial responsibility requirements for motor vehicles used in interstate commerce. Sections 13902(a)(1) and 31139, Title 49, U.S.Code. The Act requires that a motor carrier have sufficient insurance to pay a final judgment against it. Section 13906(a)(1), Title 49, U.S.Code. The MCS-90 endorsement, required by the 1980 MCA, is required to be attached to a liability insurance policy issued to an interstate motor carrier. Section 387.15, Title 49, C.F.R. Its primary purpose is to protect the public by ensuring that a carrier has independent financial responsibility for the losses that arise out of that carrier's trucking operations.

{¶31} This is evident from the standard language the government placed in the MCS-90. It provides that the insurer agrees to pay any *final judgment recovered against the insured* from public liability resulting from negligence in the operation, maintenance, or use of motor vehicles that are subject to the Motor Carrier Act of 1980. The MCS-90 also provides that the *insured agrees to reimburse the insurer for any payment made* under the MCS-90 on account of an accident, claim, or suit that the insurer would not have had to make but for the MCS-90. Therefore, the MCS-90 protects the injured person who has obtained a judgment against the insured by ensuring that the judgment will be paid. For example, when an injured person obtains a judgment against an insured yet the insured's primary policy is not obligated to cover the loss, the insurer will pay the judgment against the insured under the MCS-90 regardless of any coverage

defenses or issues involving other insurance allocation. Under the MCS-90, the insurer may then recoup its losses from its insured.

{¶32} The majority follows *John Deere Ins. Co. v. Nueva* (C.A.9, 2000), 229 F.3d 853, certiorari denied (2002) ____U.S.___, 122 S.Ct. 1063, 151 L.Ed.2d 967, and *Adams v. Royal Indemn. Co.* (C.A.10, 1996), 99 F.3d 964, but acknowledges that both are factually different from this case. In *Adams*, the injured party was unable to collect the judgment he had obtained against the tortfeasor; in *John Deere,* the alleged tortfeasor did not have insurance and presumably would be unable to pay a judgment.. The *Adams* court acknowledged that the tortfeasor was not insured under the trailer's primary insurance policy, but expansively construed the MCS-90 to cover the unpaid judgment. The *Adams* court reasoned that the policy behind the MCS-90 was to protect against *uninsured* regulated vehicles. Id. at 968. *John Deere* followed the reasoning in *Adams* because the driver of the tractor in *John Deere* was uninsured and coverage under the MCS-90 was deemed necessary to achieve its purpose of making any judgment against him collectible. *John Deere*, 229 F.3d at 859-860.

{¶33} However, just one year earlier, the same court reached the opposite result when presented with circumstances more similar to the case before us. In *Del Real v. United States Fire Ins. Crum & Forster* (C.A.9, 1999), 188 F.3d 512, 1999 WL 626619, the Ninth Circuit affirmed without a published opinion the district court's decision to deny coverage under the MCS-90 to an injured party who had collected the insurance proceeds from the tractor's insurer. *Del Real v. United States Fire Ins. Crum & Forster* (E.D.Cal.1998), 64 F.Supp.2d 958. Del Real obtained a judgment against the driver and owner of the tractor, who had admitted liability for the accident. The judgment was paid in part by the owner's insurer. Del Real attempted to collect the

remainder of the judgment from the insurance covering the trailer after its owner had been dismissed from the underlying tort case. The district court held that the plaintiff was not entitled to recover under MCS-90 because neither the driver nor the owner of the tractor was an insured under the MCS-90 endorsement covering the trailer, and the endorsement obligates the trailer's insurer only to pay "any final judgment recovered against the insured." Id. at 964. I believe that the facts of *Del Real* are more closely aligned with the situation before us.

{¶34} I also believe that the majority's decision to expand the MCS-90's coverage to reach permissive users defies both logic and common sense. In this case, the negligence of the driver of the tractor was undisputed and the tractor's liability insurance policy will indemnify him and the tractor owner up to the policy limits. Allegations of negligence made against the trailer's owner have been dropped. The driver and owner were merely permissive users of the trailer and not considered insureds for purposes of the trailer's liability insurance or MCS-90 endorsement. There is no final judgment against the trailer's insured.

{¶35} Nevertheless, as a result of today's opinion, the trailer's insurer would have to pay a judgment against a party other than its own insured. Furthermore, the insurer now has a right under the MCS-90 to recoup the payment from its insured for another person's negligence. The majority acknowledges this problem as a peripheral issue that it need not consider. It is, however, an example of the majority's overreaching interpretation and the illogical results it yields.

{¶36} The word "insured" in the MCS-90 refers to the insured identified in the body of the primary liability policy. *Campbell v. Bartlett* (C.A.10, 1992), 975 F.2d 1569; *Natl. Mut. v. Liberty Mut.* (C.A.D.C.1952), 196 F.2d 597; *Del Real*, 64 F.Supp.2d 958. I do not agree that the meaning of

"insured" may be expanded to include permissive users who are not insured under the policy. The purpose of the MCS-90, as the majority stresses, is the protection of the public. However, it must be within the confines of the contractual relationship established by the MCS-90. Therefore, for the foregoing reasons, I respectfully dissent and would affirm the judgments of the court of appeals.

MOYER, C.J., and T. BRYANT, J., concur in the foregoing dissenting opinion

Appendix B

Opinion of the Court of Appeals of Ohio

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

CASE NO. 99-T-0065

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY, DECEASED, et al.,
APPELLEES

v.

LAWRENCE P. YOB, et al.,
DEFENDANTS-APPELLANTS

Before: FORD, P.J., CHRISTLEY, J., O'NEILL, J.

O'NEILL, J.:

Appellants, Lawrence P. Yob, Bath Transport, Inc., Express Companies of America, LTD., and Central Transport Inc., appeal a May 19, 1999 decision of the Trumbull County Court of Common Pleas, in a wrongful death action filed by appellees, Marie V. Lynch, Administratrix of the Estate of Stephen M. Wiley, and Susan Reese, Administratrix of the Estate of Justin L. Reese. The following facts are relevant to a determination of this appeal.

A fatal accident occurred on the Ohio Turnpike on October 11, 1996. A tractor-trailer, operated by Lawrence P. Yob, crossed the median and struck an automobile being

driven by Justin L. Reese, in which Stephen M. Wiley was a passenger. Reese and Wiley died in the accident. The tractor portion of the rig was owned by Yob's employer, Bath Transport, Inc. and its owner, Express Companies of America, Ltd. The trailer portion of the rig was owned by a separate entity, whose identity the parties dispute. Ownership of the trailer, however, is not a critical issue in this case.

On January 24, 1997, appellees filed a complaint in Trumbull County Court of Common Pleas against Yob, the owners of the tractor-trailer, and the Ohio Turnpike Commission for wrongful death. Appellees amended their complaint on June 17, 1998, to include both insurance companies. They also included a claim for declaratory judgment. On the same date, appellees filed a motion for summary judgment as to their complaint for declaratory judgment. It is undisputed that the insurance policy on the tractor owned by Bath Transport, Inc. had a limit of $1 million. This tractor policy also had an MCS-90 endorsement which stated that it had $2 million in potential coverage. The trailer had an insurance policy with a liability limit of $2.5 million, and it also had an MCS-90 endorsement indicating $2.5 million of potential coverage.

An MCS-90 endorsement is mandated by Section 29 of the Motor Carrier Act of 1980, *49 U.S.C. Section 10927,* and requires the insurer to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles." The MCS-90 endorsement derives from the financial responsibility regulations promulgated by the Secretary of Transportation pursuant to the Motor Carrier Act of 1980. The regulations require motor carriers to obtain minimum levels of security to protect the public, either in the form of insurance or a surety bond.

The questions for the trial court involved which of the foregoing coverages and endorsements were applicable to the underlying accident, and in what amounts. Upon summary judgment, the trial court determined that the $1 million policy on the tractor was available to the estates, but that the MCS-90 endorsement on the tractor, which had a stated limit of $2 million, was actually the result of a mutual mistake of fact and should have read $1 million. The trial court also held that the $1million MCS-90 endorsement was not excess coverage but would have been available had the primary coverage not been available.

Additionally, the trial court held that the $2.5 million trailer policy was not available because a "trucker" was not an insured under the terms and conditions of the policy. The court concluded, however, that the $2.5 million MCS-90 endorsement on the trailer was applicable and coverage was available as primary insurance, otherwise a failure of coverage would result. The trial court explained:

"The Court in making this finding relies upon *Powers v. Meyers, (1995), 101 Ohio App. 3d 504, 655 N.E.2d 1358,* which held that ICC endorsements would negate exclusions found in the underlying policy inconsistent withe *(sic)* the ICC endorsements. Since the MCS-90 endorsement allows coverage, the underlying language of the policy can not be used to negate that coverage and this Court finds it does apply."

Thus, in summary, the trial court determined that the underlying insurance policy on the tractor in the amount of $1 million was available, in addition to the MCS-90 endorsement on the trailer up to its $2.5 million limit. Additionally, the trial court denied the trailer owners' motion for summary judgment on appellees' negligence claims. The court ordered the case to proceed to trial on the issue of

damages, and Civ.R. 54(B) language was included in the judgment entry.

Appellants timely filed a notice of appeal and have now set forth the following assignments of error:

"1. The trial court incorrectly granted plaintiffs partial summary judgment in determining that the trailer owners' MCS-90 endorsement provided coverage for plaintiffs' claims.

"2. The trial court incorrectly denied defendants' motion for summary judgment concerning plaintiffs' purported negligence claims against the trailer owners.

In their first assignment of error, appellants contend that the trial court erred by granting, in part, appellees' motion for summary judgment and determining that the trailer owners' MCS-90 endorsement provided coverage for appellees' claims. It is appellants' assertion that since the underlying policy provided no coverage in this case because neither the owner of the tractor nor the driver fit the definition of "insureds," it was error for the trial court to conclude that the MCS-90 endorsement somehow created coverage by broadening the definition of an "insured." We agree.

Under the language of Section II, part A, of the underlying trailer policy, coverage was provided to an "insured" for bodily injury or property damage caused by an accident. Thus, by implication, someone who was not an "insured" was not covered. While we agree with appellees' representation of the law that insurance on both the tractor and trailer portions of a truck are applicable in an accident regardless of whether the tractor or trailer was physically involved in the accident, *Contrans, Inc. v. Ryder Truck Rental, Inc. (C.A.3, 1987), 836 F.2d 163, 165,* that issue cannot be reached until it is first determined who is an "insured." The trial court determined that a "trucker," such as

Yob, as driver, or Bath Transport, as tractor owner, were not "insureds" under the underlying trailer policy. This determination is supported by the language of the trailer policy which states, in part, that any "trucker," or his agents or employees, is *not* an insured, and this issue has not been appealed. Then, after specifying who is and who is not an insured, the policy lists thirteen exclusions in Section II, Part B, none of which are applicable to this case.

The trial court, however, then held that even though Yob and Bath Transport were not "insureds" under the underlying trailer policy, somehow the MCS-90 endorsement on the trailer made them insureds for purposes of that endorsement. We disagree with that conclusion. The express language of the MCS-90 endorsement, which governs determination of this appeal, states, in relevant part:

"In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, *any final judgment recovered against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of *** the Motor Carrier Act of 1980 ***." (Emphasis added.) See 49 C.F.R. Section 387.15.

By the plain language of the MCS-90 endorsement itself, there must be a final judgment against an "insured" to trigger its provisions. In the case *sub judice,* none of the parties who can potentially be held liable for wrongful death are "insureds." Hence, the MCS-90 endorsement on the trailer is not available to appellees.

This conclusion has support in case law from various federal courts. In *John Deere Ins. Co. v. Truckin' USA* (N.D. Tex, 1996), No. 3:95- *CV-1556-D, 1996 U.S. Dist. LEXIS 22231,* aff'd (C.A. 5, 1997), *122 F.3d 270,* the court stated:

"The 'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy ***. The purpose of requiring motor carriers to maintain insurance that includes the MCS-90 endorsement 'is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.' 49 C.F.R. Section 387.1. The policy behind the endorsement would not be affected by requiring an insurer to pay the final judgments against a motor carrier that it has not contracted with as its insured, and that would be required to maintain its own insurance that meets the minimum standards set forth by federal law. [The insurer] has demonstrated, as a matter of law, that Copp Trucking and Transport do not qualify as 'insureds' under any provision of the Policy. As such, there is no set of facts under which John Deere could become liable to Copp Trucking or Transport by virtue of the MCS-90 endorsement." (Emphasis added.) *1996 U.S. Dist. LEXIS 22231* at *15-16.

Similarly, in *Progressive County Mut. Ins. Co. v. Carway (1997), 951 S.W.2d 108,* the court held:

"There is not a single case holding that a driver/employee, who was not an insured under the plain terms of the policy, was nonetheless covered. In fact, the cases hold just the opposite.

"***

"It is one thing to hold that a motor carrier is absolutely liable -- based on the Interstate Commerce Act -- for injuries resulting from the negligent operation of vehicles leased to it, but it seems an unjustified and illogical leap to hold that an insurance company -- whose sole obligation rests on contract should be bound to pay a judgment for others who are not mentioned in the ICC insurance regulation (49 C.F.R. Section

1043.1), and who are specifically excluded by the language of the policy." *Id. at 114.*

The Tenth Circuit Court of Appeals has stated:

"The [MCS-90] endorsement itself does not define the term 'insured,' but we are satisfied 'that is still a matter governed by the express provisions of the body of the contract.' *National Mut. Ins. Co. v. Liberty Mut. Ins. Co., 90 U.S. App. D.C. 362, 196 F.2d 597, 600* (D.C.Cir.), cert. denied, *344 U.S. 819, 97 L. Ed. 638, 73 S. Ct. 15 (1952)." Campbell v. Bartlett (C.A. 10, 1992), 975 F.2d 1569, 1581.*

Even the First District Court of Appeals of Ohio has stated:

"The obligations of [the insurer] under the general liability and uninsured-motorist provisions of the policy arise only with respect to an insured as that term is defined for purposes of the policy. Similarly, the rights and obligations arising under the [MCS-90 Endorsement] are contingent upon the entry of a final judgment against an insured." *Powers v. Meyers (1995), 101 Ohio App. 3d 504, 511, 655 N.E.2d 1358.*

Based upon the foregoing opinions, we hold that an MCS-90 endorsement cannot be interpreted to, in effect, add "insureds" to an underlying insurance policy who are not "insureds" as that term is defined in the policy itself. Hence, in the instant cause, since neither Yob nor Bath Transport were "insureds" in the underlying trailer policy, the MCS-90 endorsement could not magically transform them into "insureds" under the endorsement. Appellants' first assignment of error is sustained.

In their second assignment of error, appellants assert that the trial court erred in denying their motion for summary judgment regarding appellees' negligence claim against the trailer owners. We agree.

A review of the record reveals the following. The trailer owners filed a motion for summary judgment in the trial court arguing that only Yob's employer, Bath, could be held vicariously liable for his negligent conduct. They also argued that no vicarious liability attached to them as a matter of law because Yob was operating the tractor-trailer pursuant to Bath's ICC authority. In response to the motion for summary judgment, appellees submitted a memorandum in opposition in which they conceded that respondent superior did not apply. Instead, they were pursuing their claim against the trailer owners solely on the basis that the trailer owners, by operation of law, must provide excess insurance coverage pursuant to the MCS-90 endorsement.

Based upon our decision regarding appellants' first assignment of error, it is clear that the trial court should have granted the trailer owners' motion for summary judgment. Hence, appellants' second assignment of error is also sustained.

Accordingly, the judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

Appendix C

Judgment Entry of the Ohio Court of Common Pleas

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Marie V. Lynch, Admx. et al
Plaintiff

v.

Lawrence P. Yob, et al
Defendant

JUDGMENT ENTRY

This cause is before the Court on cross motions for summary judgment regarding the issue of potential insurance coverage for the underlying accident. The Court has reviewed the motion, affidavits, memoranda, pleadings, exhibits, and the applicable law.

The underlying facts are not substantially in dispute. The lawsuit arises out of an accident on October 11, 1996 involving a tractor trailer vehicle operated by Lawrence P. Yob. The tractor was owned by Bath Transport Inc. (Bath) and the trailer was owned by a separate entity. Although that exact entity owning the trailer has not been stipulated by the parties, ownership is not essential to the Court ruling on the pending matters.

The tractor trailer was operated in a negligent manner, and as a result thereof, the Plaintiff's decedents, Justin L. Reese and Stephen M. Wiley were killed. The question before this Court is the nature and extent of any insurance coverage for

the tractor and trailer owners and the driver regarding this accident.

The parties are in agreement that Bath, as the owner of the tractor, would be a responsible party and any insurance Bath had on the tractor would be available to the extent of its legal limits. The insurance policy on the Bath tractor indicates a limit of liability of $1,000,000.00. The Bath Transport policy also has an MCS endorsement which states $2,000,000.00 in potential coverage.

The trailer, which the Defendant suggests is owned by GLS Leasco of Michigan, although that has not been entirely established, has a liability limit of $2,500,000.00 for each accident and the trailer also has a MCS endorsement of $2,500,000.00 as primary insurance. The Plaintiff moves for all underlying insurance and MCS endorsements in a cumulative fashion.

The Defendants argue that, although the Bath limits of $1,000,000.00 are available, that the MCS endorsement is not excess insurance and is only attached in order to comply with federal regulations. There is also an argument that the $2,000,000.00 figure on the MCS-90 is nothing more than a clerical mistake of fact. Several affidavits have been attached to the motion to establish the mistake. The suggestion being that the MCS-90 was actually $1,000,000.00 which is the same as the limits of the policy.

The Defendant trailer owners argue that since the trailer was not in any way negligent, or at fault regarding this accident, that its underlying insurance would not be available nor would its MCS-90. Further it is argued that the underlying insurance on the trailer specifically states that it would not be available under these circumstances. The Court must determine by way of declaratory action the nature and the extent of the insurance available.

The Court finds that $1,000,000.00 of the Bath tractor policy, is available regarding this accident. The Court further finds that the MCS-90 which states $2,000,000.00 was in fact as a result of a mutual mistake as to the fact and should have been $1,000,000.00. The Court further finds that the $1,000,000.00 is not excess but would have been primary in the event the $1,000,000.00 initial coverage was not available.

As to the trailer policy, this Court is persuaded that it is an accepted princip[le] that all insurance of the tractor and trailer would be applicable in an accident such as this regardless of whether the tractor or trailer was physically involved in the accident, *Bluebird Body Co. v. Ryder Truck Rental* (1978) 583 F.2d 717, *Contrans Inc. v. Ryder Truck Rental Inc.* 836 F.2d 163, *Insurance Co. of North America v. Royal Indemnity Co.* 429 F.2d 1014.

Therefore, the Court finds that the $2,500,000.00 of insurance upon the trailer would have been primary coverage. The Court also finds along with $2,500,000.00 in coverage through the MCS 90 Endorsement. However, the insurance policy on the trailer specifically excludes this type of incident where a "trucker" is not an insured under the terms and conditions of the policy.

The question then remains if the language of the policy specifically excludes coverage under these particular circumstances, does the MCS-90 endorsement become applicable for coverage? In this case the primary insurance is not available pursuant to exclusionary language in the policy. In order to avoid a failure of coverage, the MCS-90 endorsement would be applicable.

This Court finds that the MCS-90 endorsement on the trailer policy is applicable and coverage is available as primary insurance under the endorsement to the limits of liability of $2,500,000.00. The Court in making this finding

relies upon *Powers v. Myers*, (1995) 101 Ohio App.3d 504, which held that ICC endorsements would negate exclusions found in the underlying policy inconsistent with the ICC endorsements. Since the MCS-90 endorsement allows coverage, the underlying language of the policy can not be used to negate that coverage and this Court finds it does apply.

As to the declaratory actions at issue herein, the Court finds there is no dispute as to any material fact and that there is no genuine issue as to any material facts and after construing the evidence and arguments most strongly in favor of the non moving party, reasonable minds could come to but one conclusion.

In this case the Court finds by way of summary judgment that the Bath Transport insurance policy on the tractor is applicable to the limits of $1,000,000.00. As to the trailer policy, the Court finds the MCS-90 endorsement applicable and coverage is available to $2,500,000.00 as legal limits.

Case to proceed to trial as to the issue of damages.

This is a final and appealable Order and there is no just cause for delay.

Appendix D

Statutory Provisions Involved

Pertinent provisions of Title 49 of the U.S. Code are as follows:[1]

§ 13901. Requirement for Registration

A person may provide transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or be a broker for transportation subject to jurisdiction under subchapter I of that chapter, only if the person is registered under this chapter to provide the transportation or service.

§ 13902. Registration of Motor Carriers

(a) MOTOR CARRIER GENERALLY.— (1) IN GENERAL.— Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with—

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

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[1] Sections 13901, 13902, and 13906 appear in 49 U.S.C. (1994 ed., Supp. V). The principal parts of § 31139(b) and (e) appear in 49 U.S.C. (1994 ed.), and an amendment to §31139(b) appears in 49 U.S.C. (1994 ed., Supp. V).

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

* * *

§ 13906. Security of Motor Carriers, Brokers, and Freight Forwarders

(a) MOTOR CARRIER REQUIREMENTS.—(1) LIABILITY INSURANCE REQUIREMENT.—The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A registration remains in effect only as long as the registrant continues to satisfy the security requirements of this paragraph.

* * *

(d) TYPE OF INSURANCE.—The Secretary may determine the type and amount of security filed under this section. A motor carrier may submit proof of qualifications as a self-insurer to satisfy the security requirements of this section. The Secretary shall adopt regulations governing the standards for approval as a self-insurer. Motor carriers which have been granted authority to self-insure as of January 1, 1996, shall retain that authority unless, for good cause shown and after

notice and an opportunity for a hearing, the Secretary finds that the authority must be revoked

* * *

(f) FORM OF ENDORSEMENT.—The Secretary shall also prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required under this section.

* * *

§ 31139. Minimum Financial Responsibility for Transporting Property

* * *

(b) GENERAL REQUIREMENT AND MINIMUM AMOUNT.—(1) The Secretary of Transportation shall prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for compensation by motor vehicle in the United States between a place in a State and—

(A) a place in another State;

(B) another place in the same State through a place outside of that State; or

(C) a place outside the United States.

(2) The level of financial responsibility established under paragraph (1) of this subsection shall be at least $750,000.

* * *

(e) EVIDENCE OF FINANCIAL RESPONSIBILITY.—(1) Subject to paragraph (2) of this subsection, financial responsibility

may be established by evidence of one or a combination of the following if acceptable to the Secretary of Transportation:

(A) insurance.

(B) a guarantee.

(C) a surety bond issued by a bonding company authorized to do business in the United States.

(D) qualification as a self-insurer.

(2) A person domiciled in a country contiguous to the United States and providing transportation to which a minimum level of financial responsibility under this section applies shall have evidence of financial responsibility in the motor vehicle when the person is providing the transportation. If evidence of financial responsibility is not in the vehicle, the Secretary of Transportation and the Secretary of the Treasury shall deny entry of the vehicle into the United States.

Appendix E

Regulatory Provisions Involved

Pertinent provisions of the federal regulations governing motor carriers are as follows:[1]

§ 387.1 Purpose and Scope

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§ 387.5 Definitions

As used in this subpart—

* * *

Insured and principal— the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

* * *

---

[1] Sections 387.1, 387.5, 387.7, 387.9, 387.301, and 387.313 are quoted as they appear in 49 C.F.R (2001). Section 387.15 is quoted as it appears in 49 C.F.R (2000), the version in effect at the time of the accident at issue in this case. The MCS-90 Endorsement underwent an immaterial technical revision on October 1, 2001, to remove references to the Interstate Commerce Commission.

§ 387.7 Financial Responsibility Required

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.

* * *

§ 387.9 Financial Responsibility, Minimum Levels

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	Jan. 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$750,000
* * *	* * *	* * *

§ 387.15 Forms

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in § 387.7 of this subpart. The continuous coverage requirement does not apply to Mexican motor carriers insured under § 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)
Form Approved
OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to _____

of _____

Dated at _____

this ___ day of _____, 19__

Amending Policy No. _____

Effective Date _____

Name of Insurance Company _____

Countersigned by _____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

☐This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

☐This insurance is excess and the company shall not be liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate

of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: _____

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, DC).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage

to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition,

insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

* * *

§ 387.301 Surety Bond, Certificate of Insurance, or Other Securities.

(a) *Public liability.* (1) No common or contract carrier or foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the FMCSA surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or

agreements, in the amounts prescribed in § 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code, or for loss of or damage to property of others, or, in the case of motor carriers of property operating freight vehicles described in § 387.303(b)(2) of this part, for environmental restoration.

* * *

§ 387.313 Forms and Procedures

(a) *Forms for endorsements, certificates of insurance and others.*

* * *

(4) *Use of Endorsements in MCS Series.* When Security limits certified under § 387.303 (b)(1) or (b)(2) involves coverage also required by the Department of Transportation a Form MCS endorsement prescribed by the Department of Transportation such as, and including, the Form MCS 90 endorsement is required.

* * *

Appendix F

Excerpts from Trailer Insurance Policy

SECTION II – LIABILITY COVERAGE

* * *

1. WHO IS AN INSURED

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except

(1) The owner or anyone else from whom you hire or borrow a covered "private passenger type auto".

(2) Your employee or agent if the covered "auto" is a "private passenger type auto" and is owned by that employee or agent or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered "auto".

(5) A partner of yours for a covered "private passenger type auto" owned by him or her or a member of his or her household.

c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected:

(1) is being used exclusively in your business as a "trucker"; and

(2) is being used pursuant to operating rights granted to you by a public authority.

d. The owner or anyone else from whom you hire or borrow a covered "auto" that is not a "trailer" while the covered "auto":

(1) is being used exclusively in your business as a "trucker"; and

(2) is being used pursuant to operating rights granted to you by a public authority.

* * *

However, none of the following is an "insured":

a. Any "trucker" or his or her agents or employees, other than you and your employees:

(1) if the "trucker" is subject to motor carrier insurance requirements and meets them by a means other than "auto" liability insurance.

(2) If the "trucker" is not insured for hired "autos" under an "auto" liability insurance form that insures on a primary basis the owners of the autos and their agents and employees while the "autos" are being used exclusively in the "truckers" business and pursuant to operating rights granted to the "trucker" by a public authority.

* * *

SECTION VI – DEFINITIONS

* * *

B. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include "mobile equipment".

* * *

N. "Trucker" means any person or organization engaged in the business of transporting property by "auto" for hire.

* * *

ENDORSEMENT FOR
MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY
UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to FLINT SPECIAL SERVICES, INC. of 34200 MOUND ROAD, STERLING HTS., MI 48310

Dated at CLEVELAND, OHIO this 22nd day of NOVEMBER, 1996

Amending Policy No. RMCA 143-86-32 Effective Date - 06-30-96 to 06-30-97

Name of Insurance Company NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Telephone Number (216) 479-8800. Countersigned by

s/ _____.

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "☐", for the limits shown:

☒ This insurance is primary and the company shall not be liable for amounts in excess of $2,500,000 for each accident.

☐ This insurance is excess and the company shall not be liable for amounts in excess of $ _____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the Federal Highway Administration (FHWA) or the Interstate Commerce Commission (ICC), the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date.

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, D.C.)

* * *

[Remainder of Endorsement appears at pp. 37a to 39a.]

Appendix G

Excerpts from the Brief of the United States as Amicus Curiae in *John Deere Insurance Co. v. Nueva*, *cert denied*, 122 S. Ct. 1063 (2002) (No. 00-1491)

[9]

* * *

DISCUSSION

1. The court of appeals' decision is incorrect. It is true, as the court emphasized (see Pet. App. 10a-11a), that the financial responsibility provisions of Title 49 (as they apply to both registered and unregistered carriers) and the Secretary of Transportation's implementing regulations are intended to protect the public in the case of accidents involving vehicles owned or operated by commercial motor carriers. They guarantee, in effect, that there will be resources available (up to the statutory or regulatory responsibility limit) to pay a final judgment obtained by an injured member of the public against a carrier for injury caused by the negligent operation, maintenance or use of a carrier's vehicles—even if the policy itself does not provide coverage in a particular case, and even if the carrier is otherwise insolvent. They also protect the public against **[10]** delays in the enforcement of such a judgment that might otherwise result from disputes over coverage between the carrier and its insurer, or between different insurance companies. Contrary to the court of appeals' conclusion, however, existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself.

a. As explained above (see p. 2, *supra*), Section 13906 of Title 49 conditions federal registration of a commercial (or

"for-hire") motor carrier on the carrier's filing with the Secretary proof of insurance (or other security) sufficient to pay, up to a prescribed limit, "for each final judgment *against the registrant* for bodily injury" or property damage "resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. 13906(a)(1) (emphasis added). The limitation expressed in the italicized words is repeated in the applicable regulation, 49 C.F.R. 387.301 (see pp. 2-3 & note 3, *supra*), which requires the submission of insurance or other security "conditioned to pay any final judgment recovered *against such motor carrier*" (emphasis added). Essentially the same limiting language is carried over to the MCS-90 endorsement form that the Secretary prescribes for use in complying with both the registration requirements and the similar financial responsibility requirements that apply to all carriers (registered or unregistered). See 49 C.F.R. 387.15. Because, however, that form is designed to be attached to an insurance policy, it provides that the insurer will pay "any final judgment recovered *against the insured*." In the context of the statutory and regulatory provisions that the MCS-90 form is designed to implement, that language can only sensibly be read to refer to the *named* insured to whom the underlying policy is issued—that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements.

[11] If there were any doubt about that construction of the MCS-90 form, it would be resolved by the definitions set out in the Secretary's regulations and by the other uses of the term "insured" within the Form MCS-90 itself. The applicable definitional provision specifies that for purposes of the regulations set out in Sections 387.1-387.17, the term "insured" means "the motor carrier *named* in the policy of insurance" or other security. 49 C.F.R. 387.5, "Insured and principal" (emphasis added). Moreover, the term "the insured" appears in ten other places within the body of the

MCS-90 Form. See Pet. App. 40a-43a (reprinting form). One of those occurrences is simply parallel to the use already quoted. *Id.* at 43a ("upon failure of the company to pay any final judgment recovered against the insured"). All the rest, however, are most naturally read to refer only to the named insured, see, *e.g.*, *id.* at 42a ("does not apply to injury to or death of the insured's employees"), and at least three cannot fairly bear any other construction. See *id.* at 41a ("Cancellation of this endorsement may be effected by the company or the insured."); *id.* at 42a (endorsement amends underlying policy "to assure compliance by the insured" with federal financial responsibility requirements); *id.* at 43a (all terms of policy remain "binding between the insured and the company").

Apart from the clarity of the pertinent statutory, regulatory and contractual provisions, limiting the obligation assumed by an insurer under the federal financial responsibility rules to judgments entered against the named insured makes sense for at least two reasons. First, although the federal scheme requires the modification and expansion of typical private insurance contracts, it uses such contracts as its starting point and basic tool (rather than, for example, requiring motor carriers to contribute to a publicly administered fund for the compensation of persons injured by uninsured commercial vehicles). The MCS-90 endorse-**[12]** ment requires an insurer to accept liability beyond that which it might accept in a purely private transaction, but it also requires a corresponding agreement by the insured motor carrier to reimburse the insurer for any loss that would not be covered by the underlying policy. See Pet. App. 43a (Form MCS-90). The incremental risk imposed on the insurer is therefore principally the risk that the carrier will not be able to satisfy such a reimbursement obligation. The risk of non-reimbursement is one that an insurer can evaluate fairly easily with respect to prospective named insureds, but not with

respect to third parties. Because the statutory and regulatory provisions operate by setting minimum standards for otherwise private insurance arrangements (including, in a few cases, self-insurance), it is far more natural to interpret those provisions to require motor carriers and insurers to include in their private arrangements payment and reimbursement obligations that benefit the public, but run only to each other.

Second, the federal financial responsibility provisions focus on requiring motor carriers to carry adequate insurance to protect the public from risks created by the carriers' own operations. It is central to that purpose to assure that an injured member of the public will be able to recover on a judgment against the carrier, even if the particular vehicle involved in an accident was for some reason not "specifically described in the policy," or was driven on a route the carrier was not authorized to serve, and "irrespective of the financial condition, insolvency or bankruptcy of the insured." See Pet. App. 42a, 43a (terms of Form MCS-90). It is not, however, central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier. If the registered motor carrier is legally responsible—directly, indirectly, or [13] vicariously—for injuries caused by the operation of one of its vehicles, then it should be possible for the injured party to obtain a judgment against the carrier. The federal financial responsibility provisions were designed to ensure the collectability of any such judgment—not to relieve the injured party from the obligation to obtain a final determination of legal liability (see *id.* at 42a, requiring insurer to pay any "final judgment" for public liability), or to vary the legal rules under which such a determination is to be made.

b. In deciding this case in favor of respondents, the court of appeals ignored the statutory and regulatory provisions described above. The court focused instead on the endorsement's provision that the insurer must pay a judgment "regardless of whether or not each motor vehicle [subject to the financial responsibility provisions] is specifically described in the [underlying] policy." Pet. App. 13a (emphasis omitted). Construing that language in light of the general purpose of the financial responsibility provisions to protect injured members of the public (*id.* at 10a-11a), the court concluded (*id.* at 14a) that "the effect of the MCS-90 endorsement is to modify the policy's definition of an 'insured,'" both with respect to the named insured and with respect to permissive users, by "negat[ing] the limitation [in the policy language] that only users of 'covered autos' are 'insureds.'" That conclusion rests, however, on a fundamental misunderstanding of the endorsement.

Form MCS-90 is not intended, and does not purport, to vary any term of the underlying coverage. To the contrary, the form specifically *preserves* those terms as between the insurer and the named insured. See Pet. App. 43a. The endorsement does require the insurer to pay certain judgments entered against the motor carrier, whether or not the events giving rise to the judgment come within the policy's coverage, and subject to reimbursement by the carrier if they do not. It does not, however, "modify the policy's [14] definition of an 'insured'" (*id.* at 14a), either with respect to the named insured *or* with respect to permissive users.

If an injured party obtains a judgment against the insured motor carrier (for public liability resulting from negligence with respect to vehicles subject to the financial responsibility requirements), the endorsement requires the insurer to pay the judgment, without regard to coverage under the policy. Conversely, if the injured party obtains a judgment against a

defendant other than the insured motor carrier, the insurer may or may not be required to pay that judgment *under the policy*—for instance, if the defendant was driving a "covered auto" with the permission of the named insured, see Pet. App. 4a-5a, 14a—but it will have no obligation to make payment under the endorsement. Thus, the policy and the endorsement, while linked, impose different obligations based on different key determinants: An obligation to indemnity (*i.e.*, pay without reimbursement) based on the policy's coverage of a particular risk, on the one hand, and on the other an obligation to make payment in the first instance, subject to possible reimbursement, based on a final judgment entered *against the motor carrier itself*. The court of appeals erred in confusing those two obligations.

2. The Ninth Circuit in this case relied on and endorsed a similar decision reached by the Tenth Circuit in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (1996). See Pet. App. 11a-14a. *Adams*, like the decision below, erred in construing Form MCS-90 to require an insurer to satisfy a judgment entered against a permissive user of a vehicle not covered by the underlying policy, on the theory that the endorsement "modifie[d] [the term] 'insured' as defined in the basic polic[y]." See *Adams*, 99 F.3d at 970; see also *Pierre* v. *Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001).

Petitioner contends (Pet. 20-25) that the decisions in this case and in *Adams* conflict with decisions of the Third, Fifth, [15] Eighth, and District of Columbia Circuits. Although we agree that it is difficult to reconcile some of the reasoning in those cases with that of the decision below, the cases petitioner cites are distinguishable from this one in various respects.

In *National Mutual Insurance Co.* v. *Liberty Mutual Insurance Co.*, 196 F.2d 597, cert. denied, 344 U.S. 819

(1952), the D.C. Circuit held that the insurer of a truck owner-driver who had been found liable for an accident could not recover the cost of that judgment from the insurer of the motor carrier that had hired the truck and driver. The court refused to base such liability, which was excluded by the terms of the carrier's policy, on the endorsement then required by the Interstate Commerce Commission—a precursor to the present Form MCS-90, which also provided for the (potentially reimbursable) payment of "any final judgment recovered against the insured" for injuries resulting from negligence in the operation of regulated vehicles. *Id.* at 599. It reasoned that although the endorsement "doubtless would have enured to the benefit of [the injured party], had she chosen to sue [the motor carrier]," it did not "make [the owner-driver] an 'insured' under the [carrier's] policy." *Id.* at 600.

Although that reasoning reflects a proper understanding of the language now incorporated in Form MCS-90, and is inconsistent with the Ninth Circuit's misinterpretation of that form in this case, it did not receive extended consideration from the D.C. Circuit in *National Mutual*. The holding in that case is, moreover, plausibly distinguishable from the holding below, because *National Mutual* involved a dispute over liability between two insurers, rather than a suit by an injured member of the public seeking initial satisfaction of a final judgment arising out of a trucking accident. That contextual point is one that the court below clearly considered significant to its decision, and that the **[16]** D.C. Circuit might also consider significant in a future case. Compare Pet. App. 11a (distinguishing cases on ground that "the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers"), with *National Mutual*, 196 F.2d at 598 ("This is a controversy between two insurance companies over which of them shall bear the burden of a loss."). In addition,

although the ICC endorsement at issue in *National Mutual* included the "judgment recovered against the insured" language that we think is central to proper resolution of this case, it did not include the specific language—"regardless of whether or not each motor vehicle is specifically described in the policy"—that the Ninth Circuit considered to be the "critical" feature of Form MCS-90. Compare 196 F.2d at 599 with Pet. App. 6a, 13a; see also *Adams*, 99 F.3d at 966, 968, 970. Accordingly, it is unclear whether the D.C. Circuit, if faced with a case identical to this one, would consider the result compelled by the holding or reasoning of *National Mutual*. The same is true, for essentially the same reasons, of the Third Circuit and its decision in *Carolina Casualty Insurance Co.* v. *Insurance Company of North America*, 595 F.2d 128, 135-139 & n.25 (1979).

The other two decisions that petitioner cites (Pet. 21-24) did not, as petitioner acknowledges (see Pet. 23), construe the language of the MCS-90 or its predecessor ICC endorsement. In *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F.2d 131, 136-137 (1974), the Eighth Circuit held that a motor carrier's insurance policy did not by its terms provide for the payment of a judgment recovered against an owner-driver hired by the carrier, where at the time of the accident the driver was not using his vehicle "exclusively in the business of the named insured." The court refused to vary that result on the basis of statutory and regulatory provisions different from those at issue in this case, which provided in general that a carrier that leased a vehicle must [17] accept legal responsibility for its operation. *Id.* at 138-139; see 49 U.S.C. 304(e)(2) (1970); 49 C.F.R. 1057.4 (1970); cf. 49 U.S.C. 14102(a)(4) (successor provision). In discussing that point, the court referred to the ICC's regulation requiring motor carriers to carry insurance that would pay final judgments recovered "against * * * [the] carrier." 496 F.2d at 138-139 & n.8; see 49 C.F.R. 387.301 (successor regulation). The court reasoned that because the

regulation dealing specifically with insurance—essentially the same one that is now implemented using the Form MCS-90—did not require a carrier to carry a policy that would cover judgments rendered against a party other than the carrier, it would "seem[] an unjustified and illogical leap" to hold that the separate legal responsibility provisions allowed recovery directly against the carrier's insurer, when the injured party had not taken the intermediate step of obtaining a judgment against the carrier itself. See 496 F.2d at 138-139.

Similarly, in *White* v. *Excalibur Insurance Co.*, 599 F.2d 50, 55 cert. denied, 444 U.S. 965 (1979), the Fifth Circuit held in part that the legal responsibility provisions relating to leased vehicles could not be invoked to force a carrier's insurer to pay a judgment rendered against a truck driver for negligently causing an accident that killed his fellow driver. In so holding, the court relied on *Wellman* for the proposition that under 49 U.S.C. 315 (succeeded by present Section 13906), "in order for [the insurer] to be liable under the policy filed by [the carrier] with the ICC, [the carrier] must first be adjudicated liable as a party." 599 F.2d at 55.

Like the D.C. Circuit's reasoning in *National Mutual*, the quoted statements from *Wellman* and *White* reflect a proper understanding of statutory and regulatory provisions now implemented in part through Form MCS-90, and to that extent those decisions may be said to conflict with *Adams* and the decision below. Neither decision focused, however, on the financial responsibility provisions, and neither dealt **[18]** with the text of a policy endorsement or with the present versions of the relevant statutes and regulations. Thus, as with D.C. and Third Circuits and their decisions in *National Mutual* and *Carolina Casualty*, it is not clear that either the Fifth or the Eighth Circuit would conclude that its precedents foreclose the result reached by the Ninth Circuit on the facts of this case.

3. Although the decision below is incorrect, the importance of the error is unclear. In order for the court's misinterpretation of Form MCS-90 to make a real difference, a registered motor carrier that itself carries proper insurance must first allow use of one of its vehicles (including a vehicle for which it is legally responsible, see, *e.g.*, 49 U.S.C. 14102(a)(4); 49 C.F.R. 376.12(c)(1)) by another party, who causes harm to a member of the public through negligent operation, maintenance, or use of the vehicle. The vehicle in question must be subject to the federal financial responsibility requirements, but for some reason not covered by the ordinary terms of the carrier's policy—a circumstance that the carrier will normally have strong financial (and legal) incentives to avoid. The injured party must then choose (or be able) to obtain a judgment only against the permissive user, not against the carrier (or must obtain a separate and larger judgment running only against the user). Moreover, in order for that result to be unjust, the carrier must have a valid defense that it asserted or could have asserted to avoid legal liability (direct, indirect, or vicarious) for the harm.

These circumstances are not wholly unlikely to occur; and, as petitioner points out (Pet. 27-28), the number of policy endorsements and accidents that could conceivably present the issue is at least theoretically quite large. The issue does not, however, appear to have been litigated with any great frequency in the past, including in the nearly five years between the decisions in *Adams* and in this case.

[19] Moreover, and perhaps most important, the error in both *Adams* and this case is an error in the interpretation of a form promulgated by regulation. It could therefore be fixed through a regulatory proceeding before the Department of Transportation's Federal Motor Carrier Safety Administration, which is the expert agency charged by Congress with administering the provisions of federal law dealing with motor carrier safety. "Any interested person,"

including petitioner or its amici, could ask the Administrator of the FMCSA to consider the situation and clarify the existing regulations, including Form MCS-90 itself. See 49 C.F.R. 389.31; cf., *e.g.*, *Minimum Levels of Financial Responsibility for Motor Carriers: Environmental Restoration*, 51 Fed. Reg. 33,854 (1986) (interim rule amending definition of "environmental restoration" in 49 C.F.R. 387.5 and 387.15 (Illus. I) (Form MCS-90), adopted "[i]n response to a joint petition filed by the American Insurance Association (AIA) and the American Trucking Associations (ATA)"). The Department of Transportation informs us, however, that it has received no request for regulatory action or, apart from this Court's order in the present case, for further administrative guidance with respect to the proper interpretation of Form MCS-90.

Under these circumstances, we are not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court. We do note, however, that in deciding the case, the court below did not have the benefit of any official expression of the views of the Department of Transportation in construing the endorsement in the Form MCS-90 issued by the Department. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997). Because those views are now a matter of record, this Court might wish to consider granting the petition, vacating the judgment below, and remanding the case for further consideration in light of the positions expressed in this brief. See *Raquel* v. **[20]** *Education Mgt. Corp.*, 531 U.S. 952 (2000); *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993); *Oberly* v. *Baltimore & Ohio R.R.*, 479 U.S. 980 (1986); see also *Slekis* v. *Thomas*, 525 U.S. 1098 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of the views expressed herein.

* * *

No. 02-400

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, *et al.*,

Petitioners,

v.

MARIE V. LYNCH, Administratrix of the Estate of STEPHEN M. WILEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE

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QUESTION PRESENTED

Whether the Form MCS-90 Endorsement, issued with a motor carrier's liability insurance policy which policy defines "insured" to include permissive users of the motor carrier's covered vehicles, requires the insurer to pay a final judgment entered against a permissive user of the motor carrier's own vehicle.

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STATEMENT OF THE CASE

Congress enacted the Motor Carrier Act of 1980, directing the Interstate Commerce Commission ("ICC") to promulgate regulations to assure that injured members of the public have redress for the negligence of interstate motor carriers. Accordingly, motor carriers engaged in interstate commerce are required by Federal law to register with the Department of Transportation ("DOT") and provide proof of financial responsibility. 49 U.S.C. § 13901. The regulations provide that each automobile liability insurance policy issued to a motor carrier contain an MCS-90 endorsement. ("MCS-90").

The Respondents are the Administratrix's of the estates of two young men killed in a fiery crash caused by the negligence by a driver of a tractor pulling a trailer owned by the petitioner's named insured, Centra, Inc. or a subsidiary. The ownership of the trailer is not at issue. There is no question that the insurance policy covers the trailer. There is also no question that the driver, Lawrence Yob; and the tractor owner Bath Transport were permissive users of the trailer, as defined by the insurance policy. However, that insurance policy purports, by its terms, to exclude permissive users from coverage notwithstanding the MCS-90 endorsement. The MCS-90, by its terms, provides for coverage. The petitioner, however, argues that the driver, because he was not an "insured" under the insurance policy, was not covered.

The MCS-90 provides that "no condition, provision, stipulation, or limitation contained in the policy . . . shall relieve the company from liability or from payment of any final judgment." 49 C.F.R. § 387.15. Not withstanding the specific terms of the MCS-90 endorsement, the Petitioner argues that because the insurance policy excludes "truckers" who are permissive users of the trailer, the MCS-90 endorsement is

inoperative and does not provide coverage for both Lawrence Yob and Bath Transport. Petitioners arguments are directly contrary to Congress' intent in enacting the regulation.

In a nearly identical case, the Supreme Court refused to grant a petition seeking a writ of certiorari. In *John Deere Insurance Co. v. Nueva*,[1] petitioners requested that the Court consider a question virtually identical to that presented by petitioner here: Does the MCS-90 endorsement provide coverage to injured members of the public when the underlying insurance policy disallows coverage. In an Amicus Curiae Brief submitted by the Solicitor General, the United States recommended that the Court refuse to grant certiorari because the case did not merit plenary review.[2] Notwithstanding the Solicitor General's invitation to DOT to clarify the regulation[3], DOT has not yet done so. The Solicitor General notes in his brief that no party has requested either an action to clarify any putative mis-interpretation of the MCS-90, nor for any guidance at all with respect to the MCS-90.[4]

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1. *John Deere Insurance Company v. Nueva, et al.*, 534 U.S. 1127, 122 S. Ct. 1063 (Feb. 19, 2002).

2. Brief for the United States as Amicus Curiae, *John Deere Insurance v. Nueva, et al.*, filed Jan. 8, 2002. "Under these circumstances, we are not persuaded that the court of appeal's erroneous decision in the present case merits plenary review by this court." p. 19

3. *See id.* at 19 ". . . the interpretation of a form promulgated by regulation . . . could therefore be fixed through a regulatory proceeding".

4. *See id.* at 19.

A. Factual Background

On October 11, 1996 a tractor-trailer crossed the median and slammed into an automobile on the Ohio Turnpike. Both of the car's occupants, the driver Justin Reese and his passenger, Stephen Wiley, were killed. The tractor was driven by Lawrence Yob. Yob's negligence is undisputed as the cause of the crash.[5]

The tractor was owned by Bath Transport at the time of the crash. Bath Transport was covered by an insurance policy issued by American International Insurance Group, Inc. ("AIG") with a liability limit of one million dollars. Although ownership of the trailer was not clear at the time of the crash, it is undisputed that AIG also insured the trailer with a policy limit of two million five hundred thousand dollars. *See* Petitioner's brief at 5. That policy was issued by National Union Fire Insurance Company, a wholly owned subsidiary of American International Group. *See* Petitioner's brief at 41a. Both the tractor and trailer policies carried an MCS-90 endorsement as mandated by federal law. *See id.* at 3a.

The issue before the Ohio Supreme Court was whether or not the trailer policy excludes permissive users from coverage when the MCS-90 endorsement requires coverage. *See* Petitioner's brief at 1a-2a. The policy at issue provides that "we will pay all sums an "insured" legally must pay as damages" for bodily harm. The policy defines "insureds," in pertinent part, as "anyone else while using with your permission a covered auto." Petitioner's brief at 41a. The trailer is undisputedly a covered auto. The tractor driver

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5. *See* Petitioner's brief at 2a.

pulling the trailer is a permissive user. The MCS-90 Endorsement attached to the insurance policy provides that

> the insurer agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 . . .[6]

Section 387.15 defines motor vehicle to include "a land vehicle, machine, truck, tractor, trailer or semi trailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Petitioner argues that the trailer insurance policy excludes permissive users (Yob and Bath Transport) because the definition of "trucker" in the insurance policy at issue is different from the definition of "motor vehicle" as provided in the MCS-90 Endorsement. The Petitioner disregards Congress' intent when it seeks to restrict the operation of the MCS-90 Endorsement. That Endorsement allows for the definition of a "motor vehicle" to include the trailer at issue. *See* Petitioner's brief at 37.

This Court should decline to grant Petitioner's writ of certiorari. In doing so, the Court will, once again[7], give effect

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6. 49 C.F.R. § 387.15.

7. The Court denied a petition seeking grant of certiorari less than one year ago in *John Deere Insurance Co. v. Guillermo Nueva, et al.*, 534 U.S. 1127, 122 S. Ct. 1063 (Feb. 19, 2002). The issue is nearly identical to that in the instant case.

to the Congressional intent underlying the regulations that require each interstate motor carrier's insurance policy contain an MCS-90 endorsement and assure that the endorsement be given its full and intended effect.

B. Procedural Background

On January 24, 1997 Respondents Marie V. Lynch, Administratrix of the Estate of Stephen M. Wiley, and Susan Reese, Administratrix of the Estate of Justin L. Reese, filed suit in the Trumbull County Court of Common Pleas against Yob, Bath Transport, and other defendants for wrongful death. *See* Petitioner's brief at 26a. On June 17, 1998 Respondents filed an amended complaint adding AIG as a defendant, and seeking a declaratory judgment that coverage under both the tractor and trailer policies was applicable. *Id.* at 27a. The Trumbull County Court of Common Pleas found that Yob and Bath were not insureds as that term was defined under the Trailer insurance policy. *Id.* at 28a. However, the Common Pleas Court also found that the MCS-90 endorsement to the trailer policy was applicable and insurance coverage was available in the amount of two million five hundred thousand dollars. *Id.* at 29a.

Petitioners appealed that decision. *Id.* at 18a. The Eleventh District Court of Appeals reversed. *Id.* at 25a. The Appeals Court erroneously found that the MCS-90 endorsement to the trailer policy was not applicable to Bath and Yob, since they were specifically excluded from the insurance policy to which the MCS-90 was attached. *Id.* at 24a. The appellate court did not consider the Congressional policy underlying the MCS-90, namely, protecting members of the public from negligent and unsafe motor carriers.

The Ohio Supreme Court reversed. *See* Petitioner's brief at 2a. In its decision, the court relied on precedent from the Ninth and Tenth Circuits that arose from factually similar circumstances.[8] In both of those cases, the Ninth and Tenth Circuits found that an MCS-90 endorsement provides coverage to a truck driver otherwise excluded from the insurance policy, because of the policy of public protection underlying the terms of the regulation. The Ohio court found the reasoning of these cases to be persuasive. *See Lynch v. Yob, et al.*, 95 Ohio St. 3d 441, 447, 768 N.E.2d 1158 (2002), petitioner's brief p. 10a. The Ohio Supreme Court held that an "MCS-90 endorsement in a trailer owner's policy required insurer to indemnify driver as the permissive user of the leased trailer." *Id., paragraph 1, syllabus*. In addition, "the policy definition of 'insured' to exclude a trucker who was not an employee of the named insured was invalid". *Id., paragraph 2, syllabus*. The Court so held because to do otherwise would frustrate the express Congressional policy of public protection underlying the MCS-90 Endorsement. *See* Petitioner's brief at 13a.

C. Regulatory Background

To provide the driving public with protection from negligent motor carriers, Congress enacted the Motor Carrier Act of 1980[9] which requires motor carriers engaged in interstate commerce to register with the Department of

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8. *See John Deere Insurance Co. v. Nueva, et al.*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 534 U.S. 1127, 122 S. Ct. 1063 (2002) (No. 00-1491) and *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996)

9. *See* 49 U.S.C. § 10927.

Transportation. In order to meet this registration requirement, a motor carrier must meet certain minimum financial responsibility requirements.[10] The U.S. Code provides:

> The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less that suck amount as the Secretary prescribes . . . The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles . . .

See 49 U.S.C. § 13906(a)(1).

The Secretary of Transportation prescribes the appropriate form of endorsement to be attached to the insurance policy. 49 U.S.C. § 13906(f). This form is called an MCS-90 Endorsement.[11] The MCS-90 endorsement is attached to an insurance policy to show compliance with the registration and financial responsibility requirements.

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10. *See* 49 U.S.C. § 13902(a)(1)(C).

11. The MCS-90 endorsement was first required under the authority of the now-defunct Interstate Commerce Commission. *See* ICC Termination Act of 1955. The ICC regulations remain in effect under the authority of the Department of Transportation until new regulations are promulgated. *See John Deere v. Nueva*, 229 F.3d 853, 855 n.3 (9th Cir. 2000).

The policy underlying these requirements is set out at 49 C.F.R. § 387.1[12]:

> This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

Courts considering the issue have held that Congress's purpose in creating the regulatory scheme is to "assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers". *See Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 610 (5th Cir. 1989), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990)[13]

The MCS-90 provides, in pertinent part, that:

> In consideration of the premium stated in the policy to which this endorsement is attached, the

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12. 49 C.F.R. § 387.3 entitled "Minimum Levels of Financial Responsibility for Motor Carriers" applies to (a) for hire motor carriers operating motor vehicles transporting property in interstate commerce.

13. *See also Canal Insurance Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995) and *T.H.E. Ins. Co. v. Larsen Intermodal Services, Inc.*, 242 F.3d 667, 672-73 (5th Cir. 2001).

> insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, condition, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company.[14]

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will only be granted for compelling reasons". Rules of the Supreme Court of the United States, Rule 10, "Considerations governing review on certiorari". This Court found no compelling reasons in February of this year, and petitioner presents the Court with no compelling reasons now.[15] As counsel for respondent argued in the brief in opposition to a petition for certiorari in Nueva, petitioner realizes that its best chance of convincing

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14. *See* 49 C.F.R. § 387.15 Forms.

15. *John Deere v. Nueva, et al.*, 122 S. Ct. 1063 (Feb. 19, 2002).

this court to grant its petition is by pointing out a split of decisions among the Federal Appellate Circuit Courts.[16] The alleged split of authority is illusory. Petitioner cannot point to any Federal Circuit Court decisions that stand contra to the Ohio Supreme Court decision at issue here. In support of this alleged conflict among the circuits, petitioner cites many of the very same cases that the Solicitor General found to be distinguishable in his Amicus Curiae Brief for Nueva.[17]

Petitioner first argues that the court should grant certiorari to resolve a dispute among the Circuit Courts of Appeal. Specifically, Petitioner points to a putative split of authority among the Ninth and Tenth Circuits on one side, and the Third, Fifth, Eighth, and District of Columbia Circuits on the other. *See* Petition for Writ of Certiorari at 15. Next, Petitioner attempts to argue that the Ohio Supreme Court decision is incorrect, since it relied on erroneous precedent. *See id.* at 11. Finally Petitioner argues that this Court should resolve an issue involving the interpretation of Department of Transportation regulations. *See id.* at 18. However, any claimed error in interpretations can properly be resolved by the Department's own rule-making procedures. Considered in total, none of Petitioner's arguments present this Court with the compelling reason deemed necessary to merit review.

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16. *John Deere Insurance v. Nueva, et al.* Brief in Opposition to Petition for a Writ of Certiorari, filed April 25, 2001.

17. Solicitor General, Brief for the United States, *John Deere Insurance v. Nueva, et al.*, filed Jan 8, 2002 at page 14. "Petitioner contends that the decisions in this case and in Adams conflict with decisions of the Third, Fifth, Eighth and District of Columbia Circuits . . . the cases petitioner cites are distinguishable from this on in various respects."

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH HAVE CONSIDERED THE ISSUE OF THE SCOPE OF THE MCS-90 ENDORSEMENT UNDER THE FACTS OF THIS CASE.

Petitioner cites several cases in support of its argument that this court should act to resolve a split of opinion among the Circuits regarding the scope of coverage that the MCS-90 Endorsement provides to injured members of the public. Petitioner is incorrect. Only two circuits have decided the issue on facts similar to the facts of this case.[18] Both of these cases are in accord with the decision of the Ohio Supreme Court being challenged here.

A review of the cases cited as conflicting with the Ohio decision in *Lynch v. Yob*, *Deere*, and *Adams* shows that while all of them involve tractor-trailer accidents, none of them turn on the issue under consideration here. Further, of the six cases Petitioner uses to illustrate a conflict of authority, four pre-date the current Department of Transportation regulatory scheme. In addition to not reflecting current regulations, four of the six cases do not involve a dispute between members of the general public, but rather a dispute between two insurance companies over ultimate liability issues. As discussed above, even the Solicitor General's Amicus brief written for Deere,[19] which Petitioner so heavily relies on, *see id.* at 16, states that the cases Petitioner cites

18. *See John Deere Insurance Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 and *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996)

19. *See* Brief for the United States as Amicus Curiae in *John Deere Ins. Co. v. Nueva*, *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-1491), filed January 3, 2002.

are distinguishable.[20] A brief review of each of the cases illustrates that no dispute exists among the Circuits.

Petitioner argues that *Carolina Casualty Ins. v. Insurance Co. of America* is representative of the Third Circuit's holding that the MCS-90 endorsement at issue in this case cannot be interpreted to broaden the scope of coverage provided by the insurance policy to which it is attached.[21] Carolina Casualty arose from a declaratory judgment action between the lessor and insurer of a tractor-trailer and the lessee and the lessee's insurer to determine which party had ultimate financial responsibility and the primary duty to defend the truck driver involved in an accident. *Id.* at 132. The Third Circuit found that none of the ICC endorsements at issue

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20. *See* Brief for the United States as Amicus Curiae above at p. 15 "the cases petitioner cites are distinguishable". The cases to which the Solicitor General is referring are: *National Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 196 F.2d 597 (D.C. Cir. 1952); *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974); *White v. Excalibur Ins. Co.*, 559 F.2d 50 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979); *Carolina Casualty Ins. v. Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979). These cases are cited at footnote 15 in petitioners brief as supporting the proposition that these cases are in opposition to both *John Deere v. Nueva* and *Royal Indemnity.* The cases petitioner cites in footnote 15 but which the Solicitor General does not discuss are *Jackson v. O'Shields*, 101 F.3d 1083 (5th Cir. 1996) and *John Deere Ins. Co. v. Truckin' USA*, 122 F.3d 270 (5th Cir. 1997).

21. *See Carolina Cas. Ins. v. Ins. Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979). Petitioner cites this case for the proposition that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duty to defend claims . . . or to pay judgments entered against others."

altered the party's rights and duties to contribution under the insurance policies.[22]

Carolina is distinguishable from the case under consideration here for several reasons:

- Carolina Casualty involves a dispute among two insurance companies seeking to allocate ultimate liability as between themselves. In the instant case, respondents are injured members of the public which Congress seeks to protect through regulation of the motor carrier industry. Courts have found the distinction to be significant and it will be discussed below.

- In Carolina Casualty, the tractor-trailer was owned and insured as a whole by one entity and leased and insured by another. In the instant case, the tractor and trailer are separately owned and insured.

- Carolina Casualty does not provide any discussion at all regarding the proper application of the MCS-90. Rather, the endorsement involved in Carolina is the BCM-90, which is not even found in the same subpart of the regulations at issue in the instant case.[23]

First, the issue in Carolina is not whether a court should interpret the MCS-90 expansively, in order to meet the

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22. *See Carolina Cas. Insurance* at 144.

23. *See* 49 C.F.R. § 313(a)(2) regarding aggregation of insurance policies and surety bonds for motor carriers and property brokers. The MCS-90, on the other hand, is found at 49 C.F.R § 387.15, regarding only motor carriers.

expressed policy of public protection, but rather where ultimate liability should lie, as between two insurance companies. In Carolina, one company insured the lessor of a tractor-trailer, while the other insured the lessee. In Lynch v. Yob et al, the issue is whether both the tractor policy and the trailer policy should be available for recovery by member of the public injured in a collision with the tractor-trailer.

In addition to the factual differences, petitioner ignores the fact that Carolina predates the current incarnation of the MCS-90 endorsement promulgated under the rule-making authority of the Department of Transportation. The regulations discussed in Carolina are different than those currently enacted.[24] The Dot regulations are broader that those regulating the trucking industry under the ICC. *See Century Indemnity v. Carlson*, 133 F.3d 591, 599.

Finally and perhaps most importantly, courts considering the scope of coverage provided by the MCS-90 have held that in cases involving allocation of financial responsibility between two insurance companies, the policy of public protection expressed in the DOT regulation is not implicated. As one court succinctly stated, "where a case is concerned with responsibility between insurance carriers and not with the federal policy of protecting the public, ICC considerations are not determinative." [25]

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24. "In 1986, ICC regulations were substantially modified." *Jackson v. Canal Ins.*, 101 F.3d 1083, 1086.

25. *See Allstate v. Liberty Mutual Ins. Co.*, 358 F.2d 121, 123 (1976). The Court goes on to state that "a court should give effect to otherwise existing allocations of financial responsibility where the goal of protecting the injured public has already been fulfilled."

The Fifth Circuit cases petitioner cites are distinguishable from this case for similar reasons. *Jackson v. O'Shields* is a 1996 case discussing whether the MCS-90 endorsement provides coverage to an injured member of the public. *See Jackson v. O'Shields, et al.*, 101 F.3d 1083 (5th Cir. 1996). Resolution of the issue turned on whether or not a valid lease existed between the employer of the driver and the owner of the tractor-trailer involved. *Id.* at 1085. The Fifth Circuit found that since the lease had been terminated, there was no duty by the insurer of the owner to indemnify the trucking company or its employee driving the rig. *See id.* There are significant factual differences between this case and *Lynch v. Yob, et al.*:

- *Jackson* is a dispute between two insurance companies, one of whom insured the lessor who owned the tractor-trailer, and the other who insured the lessee/motor carrier.

- *Jackson* turns on the existence of a valid lease between the parties involved. In the instant case, there is no such issue.

- The *Jackson* opinion never reaches the application and interpretation of the MCS-90.

John Deere Ins. Co. v. Truckin' USA is a 1997 case from the Fifth Circuit. This is yet another case where the insurers of parties to a lease are seeking to allocate liability after a tractor-trailer accident. *See John Deere Ins. Co. v. Truckin' USA, et al.*, 122 F.3d 270 (5th Cir. 1997). Here, the company insuring the owner of the rig and the insurer of the lessee of the rig, who provided the driver, sought to determine which company had the duty to defend and indemnify the driver.

Id. at 272. The Fifth Circuit found, in pertinent part, that the MCS-90 imposed no duty on the part of one insurer to defend or indemnify another insurer under the facts of this case. *Id.* at 275. Again, this case is significantly different from *Lynch v. Yob, et al.*:

- Truckin' is a dispute between two insurance companies. *Lynch v. Yob* is an action by an injured member of the public seeking to hold the insurer of a trailer liable for the negligence of the trailer's driver.

- In Truckin', the scope of the MCS-90 endorsement is not discussed in terms of whether the court should interpret it as expanding the insurance policy definition of an insured, but rather the discussion involves the duty one insurer owes to another for indemnification.

Contrary to petitioners assertion that this case supports the position that the MCS-90 does not expand coverage provided to injured members of the public, the Fifth Circuit states that "where an insurance policy does not provide coverage . . . except to third party members of the public through operation of the Endorsement (the MCS-90), the policy provides no coverage for purposes of disputes among insurers." *See id.* at 275. This statement seems to imply that the fifth circuit not only recognizes that insurer versus insurer cases are different than those involving members of the public, but that the MCS-90 does act to provide additional coverage, where the victim is a third party member of the public.

The final case petitioner cites from the Fifth Circuit is *White v. Excalibur Insurance*, 599 F.2d 50 (1979). In *White*, the estate of a truck driver killed in an accident is seeking to recover from the motor carrier who employed him. *Id.* at 51. The Court held that the MCS-90 does not provide coverage to the driver, even though he was a passenger in the truck at the time the accident occurred. *Id.* at 55. Instead, the estate's recovery was limited to worker's compensation benefits. *Id.* at 51.

- White is a worker's compensation case, turning on the issue of whether or not an employee who is a passenger in a leased tractor-trailer may recover from both the lessor and lessee's insurance policies. In *Lynch v. Yob, et al.*, Yob's negligence caused the accident. There is no question that Yob was an employee of Bath Transport, hauling the trailer insured by petitioner.

- White, in common with Carolina, predates the current DOT regulations. As discussed above, the current DOT regulatory scheme is broader than the prior regulations.

- White does not discuss the MCS-90 in the context of separate insurance policies on a tractor and a trailer, but rather whether an employee of a trucking company who leased a truck can seek recovery for harm suffered when the truck the employee was a passenger in was involved in an accident.

The case petitioner cites from the Eighth Circuit, *Wellman v. Liberty Mutual*, 496 F.2d 131 (1974), to illustrate a split between the appellate courts on the scope of the MCS-

90 endorsement is distinguishable as well. The issue on *Wellman* turns on who is liable to provide recovery when the driver was hauling freight on a return trip without the owner's knowledge or consent. *Id.* at 135.

- Like *Carolina* and *White*, discussed above, the ICC regulations discussed in Wellman pre-date the current DOT regulatory scheme at issue in *Lynch v. Yob*.

- The issue in *Wellman* is whether an insurance policy covers the owner/driver of a tractor-trailer, when the owner/driver leased the truck to the insured. The issue in *Lynch v. Yob* is whether the policy on the trailer is available to provide recovery for the driver of the tractor-trailer's negligence.

- The scope of coverage provided by an MCS-90 endorsement is not discussed at all. In *Lynch v. Yob, et al.* the scope of coverage provided by the MCS-90 endorsement is key to the determination of whether or not the trailer policy provides coverage to the driver of the tractor to which the trailer was attached.

Petitioner cites the DC Circuit as opposing the decisions of the Ohio Supreme Court, and the Ninth and Tenth Circuits regarding the scope of coverage the MCS-90 provides in *National Mutual Ins. v. Liberty Mutual Ins.*, 196 F.2d 597. Nation Mutual is another dispute between two insurance companies, each seeking to "bow the other through the courtroom door first".[26] The insurer of the owner/driver of a tractor-trailer seeks indemnity from the lessee's insurer after an accident. *Id.* at 598.

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26. *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 130 (3d Cir. 1978).

- *National Mutual* predates the current DOT regulatory scheme. The current DOT regulations at issue in *Lynch v. Yob* are broader than those at issue in National Mutual.

- *National Mutual* is an insurer versus insurer case. As discussed above, the policy of public protection underlying the MCS-90 at issue in *Lynch v. Yob* is not implicated in disputes between two insurers.

- *National Mutual* provides nc discussion of the public policy implicit in the MCS-90. In *Lynch v. Yob*, the Congressional policy of public protection underlying the MCS-90 was key to the Ohio Supreme Court decision which is being appealed here.

In sum, all of the cases which petitioner cites as illustrative of a dispute between the Federal Appellate Courts are distinguishable from the case under consideration here. There are however, two cases nearly on point both on the issue and the facts. Both *John Deere* and *Adams* support the Ohio Supreme Court's decision in *Lynch v. Yob*.

II. THE OHIO SUPREME COURT DECISION IN *LYNCH v. YOB* GIVES PROPER EFFECT TO THE MCS-90 ENDORSEMENT.

The Ohio Supreme Court determined that when a tractor and trailer are involved in an accident and separately owned and insured, the insurer of the trailer cannot exclude a permissive user from coverage as a "trucker" when the trailer insurance policy has an attached MCS-90 endorsement. Both the tractor policy and the trailer policy are available to provide

potential recovery to the injured party.[27] This decision reflects the policy of protecting members of the public from the negligence of motor carriers expressed by Congress in the regulation itself.

Interpreting insurance policies are matters of state contract law. *See T.H.E. Insurance Co. v. Larsen Intermodal Services*, 242 F.3d 667.[28] State courts are also required to interpret and apply questions of federal law.[29] When a court is required to interpret a statute, Ohio law requires that the Court determine the underlying intent expressed by Congress in enacting the law.[30] The Ohio court found, in accord with other courts considering the issue, that the purpose underlying the MCS-90 endorsement is that expressed in the text of the regulations itself: to provide protection to the public from the negligence of motor carriers. The Court therefore held that "Coverage is available on a trailer under a federally-mandated MCS-90 endorsement to an insurance policy even

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27. It is well-settled at law that a tractor and trailer involved in an accident are considered to be one entity, and therefore both the insurance policy on the tractor and the policy on the trailer are available for recovery. *See Bluebird Body v. Ryder Truck Rental*, 583 F.2d 717 (1978). This is true without regard to which part of the unit was actually involved in the accident. *See also Contrans, Inc. v. Ryder Truck Rental*, 836 F.2d 163, 165 (1987).

28. *See also Prestige Casualty v. Michigan Mutual.*

29. *See, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275-76 (1997).

30. "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute". *Featzka v. Millcraft Paper Co.*, 62 Ohio St. 2d 245, 247 (1980).

th ugh the operator of the rig was not an insured under the terms of the trailer's main policy and even though there was no claim that the trailer owner was negligent."[31]

In making its determination that the MCS-90 provided coverage under the facts of this case, the court relied heavily on the federal appellate decisions in *John Deere v. Nueva* and *Adams v. Royal Indemnity.*

- Like *Nueva* and *Adams*, the parties in the instant case are injured members of the public seeking redress from an insurance company attempting to avoid liability.

- Like *Nueva* and *Adams*, the federally-mandated MCS-90 endorsement in the instant case contains language that limits an insurance company's ability to deny coverage to permissive users.

- Like *Nueva* and *Adams*, neither *Yob* nor *Bath Transport* are insured under the trailer policy

- Like *Nueva* and *Adams*, *Yob* and *Bath Transport* were permissive users of the trailer.

- In *Nueva* and *Adams*, the Ninth and Tenth Circuit Courts held that although the owners of the tractors at issue were not named insureds under the respective insurance policies, they were permissive users. Since they were permissive users, the MCS-90 expanded the definition of insured to provide them coverage. Similarly, in the instant case, the Ohio Supreme Court

31. *See Lynch v. Yob, et al.*, 95 Ohio St. 3d 441, syllabus.

> found that since Yob and Bath Transport were permissive users of the trailer, the MCS-90 expanded the definition of insureds under the policy, and negated the provision in the policy that limited coverage to only those permissive users who were not truckers.

John Deere v. Nueva, 229 F.3d 853 (9th Cir. 2002), *cert. denied*, (2001) arose out of an accident involving a tractor trailer and a bus. The injured bus driver sought to recover from the uninsured truck driver, the owner of the truck, and the insurer of the trailer, even though there was no allegation that the trailer owner was negligent. John Deere Insurance, attempting to avoid having to indemnify the trailer owner, argued that while the driver of the tractor-trailer was a permissive user under the terms of the insurance policy, he was not an "insured" because the trailer was not a covered auto. The trailer policy contained an MCS-90 endorsement as required by law.

The Ninth Circuit found that the driver was an insured and therefore coverage was provided under the trailer policy. The Court found that the purpose of the MCS-90 endorsement is to ensure injured members of the public are able to obtain judgments from negligent motor carriers. *See John Deere*, 860. The court found that the MCS-90 language, stating that "no condition, provision, stipulation, or limitation contained in the policy" can relieve the insurer from paying any final judgment, operated to overcome the express exclusion of the driver from coverage as an insured. Since the driver was a permissive user of the trailer, the driver was an insured under the policy John Deere issued.

Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996) involves a similar factual situation, this time with a tractor pulling a borrowed trailer. Royal, the trailer's insurer, sough to avoid indemnifying the driver by claiming the driver was expressly excluded from coverage as an insured under the trailer policy. The trailer policy had an attached MCS-90 endorsement. The Tenth Circuit found that while the MCS-90 does not define "insured", it does act to "indirectly modify" the terms of the underlying policy. The MCS-90 must be interpreted in this manner, because to do otherwise would "subvert the purpose" of the endorsement. In addition, the court found that by deleting the terms of the insurance policy which were inconsistent with the expressed policy purpose of public protection inherent in the MCS-90, the insurer is forced into the role mandated for it by Congress. *See id.* at 971. This role is to provide protection of the public from negligent motor carriers.

Like *John Deere* and *Adams*, *Lynch v. Yob* involves a policy of insurance on a trailer where the driver of the tractor attached to the trailer is a permissive user of the trailer. The insurance policy excludes truckers like Yob from coverage under the trailer insurance policy. Otherwise, Yob would be covered as a permissive user of the trailer. Although the Ohio Supreme Court found there were some factual differences between these cases and *Lynch v. Yob*, 95 Ohio St. 3d 441, 447, the court agreed with the reasoning behind the decisions.[32] The court held that "the MCS-90 endorsement should be read to eliminating clauses in the underlying policy

32. In arguing the Ohio Supreme Court decision is incorrect, Petitioner cites contrary decisions by state courts, *see* Petitioner's brief at footnote 16. The Ohio Supreme Court properly determined that these state appellate cases were less persuasive than the federal circuit appellate cases.

restricting the scope of coverage." *See id.* The court cited John Deere and stated that finding the driver to be an insured in this situation allows the MCS-90 to serve the "purpose it was expressly designed to serve, modifying a policy to ensure the availability of insurance for negligently injured members of the public.[33]

III. THE DEPARTMENT OF TRANSPORTATION MAY PROMULGATE ANY NECESSARY CHANGE IN THE INTERPRETATION OF THE REGULATION WITHIN ITS OWN RULE-MAKING PROCEDURE. THE DEPARTMENT OF TRANSPORTATION HAS NOT PROMULGATED ANY CHANGES IN ITS RULES.

The proper forum for any necessary clarification of DOT rules and regulations is the agency's own rule-making procedure. The DOT has not made any rule changes, even after this Court refused to grant a petition seeking certiorari in *John Deere v. Nueva*, notwithstanding the Solicitor General's invitation to do so. *See* Amicus Brief at 19.

The appropriate rule-making procedure is set out at 49 C.F.R. § 389.31. This regulation provides that "Any interested person may petition the Administration to establish, amend, or repeal a rule." As the Solicitor General noted in the Amicus Curiae Brief, requested by the Court in *John Deere v. Nueva*, the opinion of the United States was that John Deere's petition seeking a writ of certiorari need not be granted because of the DOT rule-making procedures already in place. *See Amicus Brief for John Deere v. Nueva* at 19. However, there is no evidence that anyone has

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33. *See Lynch v. Yob* at 449, referring to *John Deere* at 860.

petitioned DOT to clarify any potential misinterpretation of the MCS-90. Nor is there any evidence that DOT is considering bringing about a rule-making proceeding on its own. The implication of DOT's inaction is, of course, that DOT is satisfied with the status quo. By taking no action, DOT is in effect affirming the Ninth and Tenth Circuit decisions in *John Deere v Nueva* and *Adams v. Royal Indemnity*, as well as the Ohio Supreme Court decision under consideration here.

Allowing the Department of Transportation to make any necessary clarifications concerning the possible scope of the MCS-90 through its prescribed rule-making procedures is a valid means to resolve any alleged misinterpretations of the Department's rules and regulations. Rule-making allows governmental agencies to "function efficiently and correct their own errors." *See Weinberger v. Salfi*, 95 S. Ct. 2457, 2467 (1975).

Petitioner argues that attempts to petition DOT through its rule making procedures would not be "expeditious" in this case. *See* Petitioners brief at 18. A mere argument that allowing a Federal Agency to act or not act "would not be expeditious" should be insufficient to justify taking away the power to clarify its own rules, when such power was vested in the agency by Congress. In one case, a court responding to a contention that administrative procedures should not be followed when to do so would be fruitless said that "where plaintiffs have failed even to initiate the established administrative proceedings . . . (the Court) cannot blithely accept the plaintiff's contention that the rule-making procedure will not come to fruition, especially since the plaintiffs . . . have not deemed it worthwhile to participate

(in the rule-making procedure)." *See De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 82 (D.C. Ill. 1981). While the Court's statements were based on a factually distinguishable case, its language is equally apt here. Petitioner complains of the misinterpretation of a DOT rule, yet has not sought a clarification of that rule from the DOT, apparently because Petitioner finds it would "take too long" to do so. Like plaintiffs in *De La Fuente*, petitioner has not yet even tried to allow DOT to clarify its own rule. Perhaps petitioner fears the result.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request the Court to decline to grant the petition seeking writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-400

In the Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF *AMICI CURIAE* OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented in the Petition for Writ of Certiorari is:

> Whether the MCS-90 Endorsement, a federally mandated endorsement to a motor carrier's insurance policy, requires the insurance company to pay a judgment against a defendant that is not an insured under its policy.

CORPORATE DISCLOSURE STATEMENT

The Trucking Industry Defense Association (TIDA) is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

TIDA maintains a vested interest in the outcome of this litigation due to its potentially significant ramifications throughout the trucking industry.

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PETITION FOR WRIT OF CERTIORARI

Amicus Curiae Trucking Industry Defense Association (TIDA) respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The Opinion of the Supreme Court of Ohio is reported at 95 Ohio St. 3d 441 and 768 N.E.2d 1158. The Opinion of the Court of Appeals of Ohio is reported unofficially at 2000 Ohio App. LEXIS 5771 and 2000 WL 1804347. The entry of judgment of the Ohio Court of Common Pleas is not reported.

JURISDICTION

The Opinion of the Supreme Court of Ohio was issued on June 12, 2002. That Opinion reinstated the trial court's declaratory judgment that there was insurance coverage under the policy at issue here. That declaratory judgment had been certified by the trial court as a final judgment under Ohio R. Civ. P. 54(B). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §13901-13908 and 31139. Pertinent provisions are reprinted at App. 30a. The regulations promulgated thereunder are published at 49 C.F.R. §387.1-387.419. Pertinent provisions are reprinted at App. 34a. The MCS-90 Endorsement, set forth at 49 C.F.R. §387.15, is reprinted at App. 35a.

STATEMENT OF THE CASE

Amicus Curiae Trucking Industry Defense Association ("TIDA") is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and trucking insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding safety, risk management, personal injury, property damage and workers' compensation claims. TIDA has a vested interested in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the industry as a whole.

TIDA hereby joins in the Statement of Case previously set forth by Petitioners in the Petition for Writ of Certiorari, in its entirety.

TIDA's members, both those involved in the insurance aspects of the trucking business as well as those involved in the operation of motor carriers, have a substantial interest in the Ohio Supreme Court's Decision in this matter. Essentially, the Ohio Supreme Court has held that pursuant to the federally mandated MCS-90 Endorsement, the liability insurer of a motor carrier and ultimately the motor carrier itself through the MCS-90 Endorsement's reimbursement provisions, are directly financially responsible for motor vehicle accident damages caused entirely by other motor carriers who are not insureds under the subject policy, despite the fact that the innocent motor carrier is not even alleged to have played any causal role in the occurrence of the accident or resulting damages.

All of the Members of TIDA have a substantial interest in the Ohio Supreme Court's holding in this matter

because it represents a recurring misapplication of the carefully structured federally mandated financial responsibility scheme which results in substantial losses being incorrectly borne by innocent motor carriers and/or their insurers. One of the single most substantial expenses associated with operation of any trucking business is the implementation of adequate financial responsibility, as mandated by federal law. The vast majority of motor carriers satisfy the financial responsibility requirement through liability insurance coverage such as that purchased by Centra Inc., from Petitioner National Union in the present matter.

The federally mandated financial responsibility scheme is structured, consistent with the most fundamental tort concepts, such that the at fault motor carrier bears the ultimate financial losses arising from trucking accidents. 49 C.F.R. § 387.1 *et seq*. Although the loss may initially be paid by the liability insurer, it is ultimately transferred to the at fault motor carrier through the adjustment of premiums over time based upon the motor carrier's loss history and/or by operation of the reimbursement provisions of the MCS-90 Endorsement. Imposition of the ultimate cost of a motor vehicle accident upon the at fault motor carrier, in addition to effectuating the fundamental fairness that the responsible party be held accountable, also serves a very important public policy by ultimately forcing irresponsible and unsafe motor carriers out of business through escalating premium costs and/or the inability to procure insurance coverage. Elimination of irresponsible and unsafe motor carriers through higher expenses, while allowing responsible and safe motor carriers to enjoy the lower premiums associated with proper operation of their fleets, makes our highways a safer and more efficient means of transportation.

The Ohio Supreme Court's decision in this matter, like that of the Ninth Circuit Court of Appeals in *John Deere v. Guillermo Nueva*, 229 F.3rd 853 (9th Cir. 2000), defeats the important public policy of safer highways created by the federal financial responsibility requirements, by imposing the costs of trucking accidents upon innocent, uninvolved motor carriers. Imposition and spreading of trucking accident costs to innocent, uninvolved motor carriers completely defeats the important public policy underlying the carefully structured federal financial responsibility system.

In addition to improperly punishing innocent, uninvolved motor carriers, the Ohio Supreme Court's decision in this action also imposes risks upon the liability insurer of the innocent motor carrier which could never have been anticipated or accounted for in the underwriting process. When analyzing whether to issue liability coverage to a motor carrier, insurers consider the motor carrier's business operation, safety policies, drivers, assets and loss history. Based upon this information, the insurer then decides whether it will issue liability coverage to the motor carrier and if so the amount of premium to charge. Because the Ohio Supreme Court has imposed an indemnity obligation on National Union for a motor vehicle accident in which National Union's insured was uninvolved, there is no conceivable way National Union could have ever contemplated this substantial additional risk when deciding whether to issue coverage to Centra, Inc., or when calculating the premium.

As is set forth at length in the Petition for Writ of Certiorari and the Appendix, the Department of Transportation agrees that the rationale and conclusion of the Ohio Supreme Court as well as the Ninth Circuit's decision in *John Deere, supra.*, are clear and direct misapplications of the language and intended purpose of the MCS-90 Endorsement.

Insurers and the trucking industry have structured their respective business operations in reliance on the correct application of the MCS-90 Endorsement.

The practical ramifications of the expanded scope of potential unknown and unanticipated insureds created by the Ohio Supreme Court's holding necessarily will result in increased premiums industry wide to accommodate the expanded risks. Such increased premiums in an industry already burdened by high insurance costs and high fuel costs will cause many smaller motor carriers to be unable to compete, will increase the costs of transporting freight and overall will have a significant negative impact, not only on the trucking industry, but also on the economy in general. As is made clear by the express language of the MCS-90 Endorsement, the pertinent federal regulations, and the Department of Transportation's *Amicus* Brief submitted to this Court in *John Deere, supra.*, this is neither the purpose nor the intent of the MCS-90 Endorsement.

In this action, there are no allegations that the trailer owner, Centra, Inc., was negligent in any manner or played any causal role in the occurrence of the accident. The Respondents have pursued the culpable motor carrier and its driver which maintained $1,000,000 of liability coverage for this accident in compliance with the federal financial responsibility requirements. No judgment has or could be entered against National Union's insured, Centra, Inc. Nonetheless, the Ohio Supreme Court incorrectly employed the MCS-90 Endorsement to rewrite the substantive terms and provisions of the National Union policy regarding who is an insured, despite the fact that the MCS-90 Endorsement is not in conflict with the policy's definition of an insured.

This has become a frequently reoccurring issue nationally. Therefore, this Honorable Court should grant certiorari to review this issue and the decision of the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE MCS-90 ENDORSEMENT DOES NOT ALTER THE TERMS OF THE UNDERLYING POLICY OF INSURANCE AND IS NOT AVAILABLE FOR JUDGMENTS AGAINST NON-INSUREDS.

As is set forth in 49 C.F.R §387.15, the MCS-90 Endorsement is separate and distinct from the underlying liability insurance policy. It only operates in circumstances where the terms of the underlying insurance policy would preclude an indemnity obligation which is required by the federal regulations set forth in 49 CFS §§387.1-387.17. Thus, the analysis of whether indemnity is owed for a particular accident is two fold. First, the language of the underlying policy must be reviewed to determine whether indemnity is owed. In this action, it is correctly undisputed that, pursuant to the language of the National Union policy, National Union has no indemnity obligation for Respondent's tort claims against Lawrence B. Yob and Bath Transport, Inc.

Second, the language of the MCS-90 Endorsement, in conjunction with related federal regulations, must be analyzed to determine whether indemnity is owed based upon the facts of the particular accident. It is respectfully submitted that neither the language of the MCS-90 Endorsement nor the related federal regulations mandate any indemnity obligation on behalf of National Union for the underlying accident.

Although the language of the MCS-90 Endorsement expands the indemnity obligation with respect to non-scheduled vehicles, it does not in any manner alter or change the identity of those insured in the underlying insurance policy.

Definitions set forth in 49 C.F.R §387.3 make clear that only the motor carrier named in the policy of insurance is an insured under the MCS-90 Endorsement. In this regard, the term "insured and principal" is defined in 49 CFS §387.3 as,

> the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Id.

Clearly the term "insured" for purposes of subpart §387.1-387.17 is the "motor carrier named in the policy of insurance . . . " When this definition is applied to the MCS-90 Endorsement, it is evident that no indemnity obligation to non-insureds, such as Mr. Yob and Bath Transport, Inc., is owed under the MCS-90 Endorsement.

As is explained by the Department of Transportation in its *Amicus Brief* to this Court in *John Deere, supra.*, the reasoning of the Ohio Supreme Court and the Ninth Circuit's Decision in *John Deere*, are flawed as they inter-mix the unrelated concepts of "covered autos" and the determination of who is an insured. It is only by improperly re-writing the policy language that the Ohio Supreme Court reaches its conclusion. There is no language in the MCS-90 Endorsement nor in the related federal regulations that states or implies the policy language shall be altered, changed, or

modified in any way. To the contrary, policy provisions which conflict with the indemnity obligations prescribed by the federal regulations are simply void and unenforceable. However, in this case, as is explained more fully in the Department of Transportation *Amicus Brief* in *John Deere, supra.*, there is not and can not be any conflict between the MCS-90 Endorsement and the policy's definition of an insured because the MCS-90 Endorsement does not address this issue.

Because the Ohio Supreme Court's holding is in direct conflict with the public policy expressed by the Department of Transportation through the federal regulations and more recently in its *Amicus Brief* to this Court in *John Deere, supra.*, and because that holding has such far reaching ramifications, this Honorable Court should grant certiorari.

II. THE DECISION BY THE OHIO SUPREME COURT CONTRADICTS THE DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF ITS OWN REGULATIONS AS WELL AS THE DECISIONS OF OTHER CIRCUITS AND STATE COURTS OF LAST RESORT.[1]

The significance of the conflict currently existing among the various circuits and the Ohio Supreme Court on this issue is illustrated by the fortuitous occurrence of the accident at issue. Had the accident not occurred on the Ohio

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[1] With respect to the Ohio Supreme Court's conflict with the Department of Transportation's Interpretation of its regulations, TIDA hereby incorporates by reference Petitioner's Petition for Writ of Certiorari.

Turnpike but had instead occurred on the Pennsylvania Turnpike only a few miles away, the outcome of National Union's indemnity obligation under the MCS-90 would have been decided in a directly contradictory manner. In this regard, the Third Circuit Court of Appeals addressed this issue in *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128 (3d Cir. 1979). In *Carolina Casualty,* the Third Circuit Court of Appeals held that the BMC-90 Endorsement (predecessor to the MCS-90 Endorsement)[2] applied only to the named insured. In *Carolina*, Stanford was the owner of the tractor and was insured by Carolina Casualty. Refrigerated Transport Company, while insured by the Insurance Company of North America, ("INA") leased the tractor from Stanford. *Id.,* at 130. Stanford provided a driver to Refrigerated Transport Company in conjunction with the lease. The leased vehicle was involved in an accident while hauling cargo on behalf of Refrigerated Transport and while displaying the ICC placards of Refrigerated Transport. *Id.,* at 129. The plaintiff sued both Stanford and Refrigerated Transport, and their respective insurers filed separate declaratory judgment actions to determine coverage.

In over turning the decision of the District Court and holding that the BMC-90 Endorsement attached to the INA policy imposed no obligation upon INA (Refrigerated Transport's insurer) with respect to the permissive user, Stanford. The Court reasoned:

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[2] The cases from the 1970's concern the "BMC-90" Endorsement, while those since the early 1980's involve the successor form, MCS-90. However, with respect to this issue there are no material distinctions. See *Canal Insurance Company v. First General Insurance Company*, 889 F.2d 604, 611 (5th Cir. 1989).

> In the case before us, we find in particular that neither the federal motor carrier laws nor the (imputed) ICC Endorsement nor Paragraph 3 of Refrigerated's trip lease, transferred to Refrigerated the duties to defend claims properly brought against others or to pay judgments entered against others. 49 U.S.C. §315 [now 49 U.S.C. §10927] and 49 C.F.R. §1043.1 (a), governing insurance and other assurances of motor carriers' financial responsibility, require only that the carrier give security "to pay any final judgment recovered against such motor carrier . . ."; they mention nothing about defense of actions and nothing about payment of judgment recovered against the other parties such as lessors.

Id., at 139. Thus, INA was not responsible for any indemnity obligation on behalf of Stanford under the federal endorsement.

Given the Third Circuit's holding that these federally mandated endorsements do not modify or otherwise extend coverage to parties not named as insureds, such as Mr. Yob and Bath Transport, Inc., had the accident at issue occurred across the border in Pennsylvania, National Union would not have any indemnity obligation.

In *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974), Liberty Mutual insured Morgan Drive-Away. Mitchell owned and operated the vehicle which had been leased to Morgan and which displayed Morgan's ICC placards. *Id.*, at 132. While operating the vehicle, Morgan was involved in an accident causing injury to

Wellman. Wellman commenced an action against Mitchell and Morgan. However, Morgan was dismissed from that action. Default judgment was taken against Mitchell, the owner-operator and Wellman then attempted to collect from Liberty Mutual, Morgan's insurer.

The Eighth Circuit held that Mitchell was not covered under the Liberty Mutual policy, nor by the ICC endorsement:

> The relevant ICC regulation on insurance, 49 C.F.R. §1043, contains no provisions which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier. *Id.*, at 138. Because no judgment was entered against Morgan, the ICC endorsement did not impose any indemnity obligation upon Liberty Mutual for the judgment against non-insured owner operators:
>
> * * *
>
> Had the Wellmans obtained a state court judgment against Morgan, the result in this case would have been different, for the insurance policy would clearly have covered Morgan as the "named insured" even though its liability would be vicarious and statutorily derived.

Id., at 138-139.

Additionally, other Circuits have adopted the same rationale as the Third and Eighth Circuits, in direct conflict with the Ninth Circuit's decision and the Ohio Supreme Court's decision. See *White v. Excalibur Insurance Company*, 599 F.2d 50, 55 (5th Cir.) cert denied., 444 U.S. 965 (1979) (holding plaintiff could recover from the insurer under federal law only if she had obtained a judgment against the insured); *Nowak v. Transport Indemnity Company*, 120 Wis. 2d 635, 358 N.W. 2d 294, 296 (Wis. Ct. App. 1984) (holding a "final judgment recovered against the insured" refers only to a judgment entered against a named insured motor carrier); *Transport Indemnity Company v. Teter*, 575 S.W. 2d 780, 785 (Mo. Ct. App. 1978) (rejecting the argument that the federal endorsement should be read in conjunction with the "who is an insured"clause of the policy; rather, the endorsement stands on its own and is triggered only by a judgment against the named insured); *National Mutual Insurance Company v. Liberty Mutual Insurance Company*, 196 F.2d 597, 600 (D.C. Cir.) cert. denied, 344 U.S. 819 (1952); *Jackson v. O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996); *John Deere Ins. Co. v. Truckin' U.S.A.*, 122 F.3d 270, 275 (5th Cir. 1997); *Kesler v. Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) cert. denied 675 So. 2d 1085 (La. 1996); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997).

Similar to the cases cited above, a judgment has not been rendered against National Union's insured, Centra, Inc. As these cases have held, the MCS-90 Endorsement is not applicable unless a judgment has been rendered against a named insured. Because the Ohio Supreme Court has ignored these precedents and has not followed the Department of Transportation's own interpretation of the applicable regulations, certiorari should be granted.

III. PUBLIC POLICY CONSIDERATIONS REQUIRE THAT THE OHIO SUPREME COURT'S DECISION BE REVIEWED.

Common to all motor carriers is the requirement for adequate financial responsibility for potential liability such as that arising from the subject motor vehicle accident. Most motor carriers satisfy this requirement through liability insurance coverage. Liability insurance coverage is one of the single most substantial expenditures for many motor carriers.

Like other forms of insurance, liability insurance is based upon a calculation of risk. Of paramount importance in this analysis is the amount of risk as determined by the policy's monetary limits of liability, as well as the scope of risk as determined by numerous factors associated with the manner in which the insured operates. Among these factors, insurers take into account the risk exposure created by the MCS-90 Endorsement. Creation of an indemnity obligation such as that effectuated by the Ohio Supreme Court's decision in this case, makes an accurate evaluation of the risk impossible to determine. The attendant additional risk for conduct and activities of non-insureds, whose business operation, safety policies, drivers, and loss history were completely unknown to the insurer when the policy was issued, dramatically distorts the risk accepted by National Union in the underwriting analysis. It effectively prevents an insurer from ever performing an accurate and comprehensive projection of risk. This is so because there are literally an infinite number of potential persons or entities who the insurer could be obligated to indemnify under the Ohio Supreme Court's holding. Clearly, as set forth more fully above, this infinite scope of risk was not intended nor mandated by the applicable federal regulations.

The federally mandated financial responsibility requirements are structured such that the at-fault motor carrier bears the ultimate financial losses arising from trucking accidents. Imposition of the ultimate cost of a motor vehicle accident upon the at-fault motor carrier through higher insurance premiums serves the very important public policy of weeding out irresponsible and unsafe motor carriers through escalating insurance premiums and/or the inability to procure insurance coverage. Elimination of such irresponsible and unsafe motor carriers in this manner makes our highways safer.

Conversely, imposing the cost of motor vehicle accidents on innocent, uninvolved motor carriers[3] defeats this weeding out process and simply spreads the cost industry-wide. This allows unsafe motor carriers to escape the total cost of their own culpable conduct. These higher industry-wide costs will then be passed on to consumers in the form of higher transportation fees and generally have an adverse effect on the economy as a whole. Further, smaller motor carriers that operate on already existing tight margins will have the additional burden of paying losses created by other culpable motor carriers in the form of higher insurance premiums industry-wide. For many smaller innocent motor carriers, this additional cost will be too great and will force them out

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[3] The reimbursement provisions of the MCS-90 mandate that the named insured reimburse the insurer for indemnity payments imposed by the MCS-90 but which were not created by the insurance policy itself. Thus, the innocent, uninvolved motor carrier ultimately may bear the loss. Further, as is explained above, even if the innocent, uninvolved motor carrier does not directly reimburse the liability insurer through the MCS-90, it will ultimately pay for the loss through higher insurance premiums in the future.

of business, leaving other unsafe motor carriers free to operate. As a result, innocent motor carriers will be forced out of business, leaving other unsafe motor carriers free to operate.

It is respectfully submitted that this case presents a compelling question previously unaddressed by this Honorable Court that has wide-reaching public ramifications. Thus, certiorari should be granted so that the Ohio Supreme Court's decision can be reviewed and reconciled with the conflicting authorities, the plain language of the pertinent federal regulations and the Department of Transportation's interpretation of those regulations.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, it is respectfully submitted that the Petition for Writ of Certiorari by National Union Fire Insurance Company of Pittsburgh, PA, American International Group, Inc., Sentra, Inc., Central Transport, Inc., and GLS Leasco of Michigan, Inc., should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-400

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF FOR PETITIONERS

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* There has been no change in the Corporate Disclosure Statement contained in the petition for certiorari.

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REPLY BRIEF FOR PETITIONERS

The reasons for denying certiorari proffered by Respondents in their Brief in Opposition ("Opp.") cannot withstand analysis. More importantly, Respondents do not even attempt to deal with the more compelling grounds supporting certiorari. They wholly ignore the fact that the construction of the MCS-90 Endorsement which they defend has been squarely rejected by the Department of Transportation ("DOT"), the very agency that promulgated the Endorsement.[1] Moreover, while they downplay (albeit erroneously) the existing conflict in the lower court decisions, they ignore the fact that this conflict can only recur and intensify in light of DOT's position on the matter. Lower courts must now reject either the interpretation of the MCS-90 Endorsement adopted by DOT or decisions such as that rendered by the Ohio Supreme Court in this case.[2] In fact, a case posing that choice is now *sub judice* in the New York Court of Appeals.[3] The Court should grant certiorari to resolve this recurring conflict so that motor carriers, their insurers, and the representatives of accident victims will know without further delay the scope of obligations imposed by the federally mandated MCS-90 Endorsement.

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[1] See Brief for the United States as Amicus Curiae in *John Deere Ins. Co.* v. *Nueva*, *cert. denied*, 534 U.S. 1127 (2002) (No. 00-1491) (filed Jan. 3, 2002). This brief is excerpted at Pet. App. 45a-56a, and has been separately lodged with the Clerk by Respondents.

[2] Contrary to what is implied at p. 6 of the Opposition, the Ohio Supreme Court did not prepare a syllabus in this case. The quotations at p. 6 appear to be taken from the synopsis of the case prepared by West Publishing for the North Eastern Reporter. See 768 N.E.2d 1158.

[3] *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.) (No. 170, argued Nov. 12, 2002).

A. The Decision Below Is Contrary to DOT's Interpretation of Its Regulations and of the Statutory Purpose.

As shown in the Petition (Pet. 11-13), the decision of the Ohio Supreme Court conflicts with the Department of Transportation's interpretation of its own regulations — an interpretation that is entitled to judicial deference. That fact notwithstanding, Respondents (Opp. 25) assert that "DOT is satisfied with the status quo" and that DOT is "in effect affirming the Ninth and Tenth Circuit decisions in" *John Deere Ins. Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 534 U.S. 1127 (2002), and *Adams* v. *Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996). Respondents' contention is based solely on the fact that DOT has not initiated rulemaking to overturn the decisions in those cases. No authority is cited, however, for the proposition that an agency's inaction constitutes acquiescence in decisions rendered in private party litigation that the agency believes have misconstrued its regulations. That proposition is particularly inapt in the circumstances of this case, given that less than a year ago the General Counsel of DOT signed a brief that concluded that the construction of the MCS-90 Endorsement adopted in *Nueva* and *Adams* was "incorrect." See Pet. App. 45a, 50a.

Equally unfounded is Respondents' assertion (Opp. 25) that review by this Court would mean "taking away [from DOT] the power to clarify its own rules . . . ." Under that misguided principle, this Court would never grant review of a decision that misconstrues an agency's regulations. Moreover, the practical effect of Respondents' position — that the agency's interpretation of its regulations should be ignored — is at odds with the well-established principle of requiring deference to that interpretation. *E.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

In any event, Respondents' assertion that DOT's regulations need "clarifying" fails to specify what is unclear. As shown in the Petition (at 12-13), the MCS-90 Endorsement requires insurance coverage for "any final judgment recovered *against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." Pet. App. 38a (emphasis added). And the accompanying regulation defines "insured" as meaning "the *motor carrier named* in the policy of insurance . . . ." 49 C.F.R. § 387.5 (emphasis added) (Pet. App. 34a). There is nothing in this language that provides any textual basis for the decision below imposing on an insurer liability for judgments rendered against someone other than the named insured. While Respondents obfuscate the point here (see Opp. 3-4), it was undisputed in the Ohio courts that neither Yob nor Bath Transport were insureds under the trailer policy. Pet. App. 3a.

Respondents defend the decision below on the ground that it ensures that "injured members of the public have redress for the negligence of interstate motor carriers." Opp. 1; see *id.* at 19-24. That assertion ignores the fact that Respondents already have redress here against the insurance coverage for the tractor operator — the actual negligent party in the case. The trial court's ruling that "$1,000,000.00 of the Bath tractor policy[] is available regarding this accident" was not appealed. Pet. App. 28a. Hence, the required insurance coverage *is* available from the responsible party, whose negligence is uncontested.

What the Ohio Supreme Court did in this case was to rewrite an insurance policy and the MCS-90 Endorsement so as to permit recovery of an amount in excess of the coverage required under DOT regulations from the insurer of the party (the trailer owner) whose lack of culpability was

uncontested.[4] There is no good reason to believe that this result furthers the statutory purpose. On the contrary, the Solicitor General informed the Court in *Nueva* that "[i]t is not . . . central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier." Pet. App. 48a.[5] The fact that the decision below has plainly misconstrued a federal regulation of widespread practical importance warrants review by this Court.

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[4] This is clear from the description of the issue presented as framed by the Ohio Supreme Court:

> "The specific issue for consideration is whether coverage is available on the trailer under a federally mandated endorsement to the insurance policy, called an MCS-90 endorsement, even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent." Pet. App. 2a.

The state-law principle discussed at Opp. 20 n.27 (that both the tractor policy and the trailer policy are available in the event of an accident) applies only if there is coverage available under both policies. In this case, there is no coverage under the "trailer's main policy," and thus that authority is not on point.

[5] Moreover, as the Trucking Industry Defense Association shows in its brief as *Amicus Curiae*, the result reached below has the untoward effect of shifting the ultimate costs for an accident away from the negligent carriers to innocent lessors of equipment such as trailers. That result is contrary to one of the two principal purposes underlying the DOT regulations — namely, "to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner . . . ." 49 C.F.R. § 387.1 (Pet. App. 34a).

B. The Decision Below Exacerbates the Conflict in the Decisions Construing the MCS-90 Endorsement.

Certiorari is also justified because the decision below exacerbates a pre-existing conflict on decisions construing the MCS-90 Endorsement. Respondents try (Opp. 11-19) to downplay the conflict, but that effort to distinguish earlier decisions cannot withstand analysis.[6] Putting to the side purported distinctions that have no conceivable legal significance,[7] Respondents assert two arguments to explain away the conflict:

- Cases such as *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979), involve disputes over which of several insurers shall pay the injured party, while this case involves a dispute between an injured party and an insurance company.
- Many of the cases in conflict with the decision of the Ohio Supreme Court arose under an earlier ICC BMC-90 Endorsement.

Neither distinction holds water.[8] As previously pointed out (Pet. 15), the operative language in the MCS-90

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[6] Respondents also completely ignore the conflict in state court decisions. See Pet. 14 n.16.

[7] For instance, Respondents try to distinguish *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979), on the ground that "[i]n Carolina Casualty, the tractor-trailer was owned and insured as a whole by one entity and leased and insured by another. . In the instant case, the tractor and trailer are separately owned and insured." Opp. 13. No explanation is given (and none is apparent) as to why this distinction should lead to an interpretation of the MCS-90 Endorsement in this case that differs from that in *Carolina Casualty*.

[8] The *amicus* brief for the Trucking Industry Defense Association further develops the conflict between the decision below and other lower court decisions.

Endorsement and the accompanying regulations cannot mean one thing when an insurance company is the claimant and something else when an accident victim is the claimant. Furthermore, there is no material difference for present purposes between the MCS-90 Endorsement and the earlier BMC-90 Endorsement. The Solicitor General in the *Nueva* brief described the requirement at issue in the earlier decisions as being "essentially the same one that is now implemented using the Form MCS-90 . . . ."[9] Pet App. 53a. See *Canal Ins. Co.* v. *First Gen. Ins. Co.*, 889 F.2d 604, 611 (1989) (describing the MCS-90 and BMC-90 Endorsements as being "identical in relevant part"), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990).[10]

More importantly, Respondents fail to respond to the point (Pet. 16-18) that the conflict will recur until resolved by this Court. Indeed, the uncertainty is likely to increase now that DOT has spoken on the issue of how the MCS-90 Endorsement should be construed. Lower courts must either disregard the views of DOT on its own regulations or disregard decisions such as the Ohio court's in this case and the Ninth Circuit's in *Nueva*. One such case is already pending in the New York Court of Appeals and was argued

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[9] The basis for this conclusion can be seen by comparing the excerpt of the BMC-90 Endorsement quoted in the *Carolina Casualty* decision, 595 F.2d at 136 n.25, with the corresponding provisions in the MCS-90 Endorsement, Pet. App. 38a-39a.

[10] Respondents describe (Opp. 14) the MCS-90 Endorsement as being "broader" than its predecessor. For present purposes, however, the two forms are essentially identical, because the differences are not relevant to the resolution of this case. Private and other ICC-exempt carriers were required to obtain insurance coverage containing the MCS-90 Endorsement; those carriers were not required to obtain coverage under the BCM-90 Endorsement. Moreover, unlike the BMC-90 Endorsement, the MCS-90 Endorsement provided coverage for environmental damage. See *Motor Carriers of Prop. Minimum Amounts of Bodily Injury & Prop. Damage Liab. Ins.*, 132 M.C.C. 948, 950-52 (1982).

on November 12, 2002. *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.) (No. 170).[11] No doubt — given the frequency of accidents involving trucks (see Pet. 9) — numerous other cases will follow. Rather than allow the present uncertainty to linger on, the Court should grant certiorari now to resolve the conflict.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the Petition and undertake plenary review. In the alternative, it should grant the Petition, vacate the judgment of the Supreme Court of Ohio, and remand the case for consideration in light of the stated position of the Department of Transportation.

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[11] Petitioners will inform the Court if *Pierre* is decided before the Court acts on the Petition.